TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX, APPELLANT,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

FILED DECEMBER 4, 1939.

SUPREME COURT OF THE UNITED STATES

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vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

INDEX.

	Original	Print
Record from Supreme Court of New Jersey	a	1
Caption (omitted in printing)	a	
Summons and sheriff's return (omitted in printing)	1	
Complaint	3	1
Demand for affidavit of merits (omitted in printing)	7	
Answer to complaint	7	4
Notice of motion to strike answer and for judgment in favor of plaintiff	9	6
Affidavit of Harry M. Veix	10	6
Notice of motion to strike out complaint	11	8
Affidavit of Wm. Mattes, Jr., on motion to strike out complaint and to strike out answer	13	8
Photostats of certificates of prepaid shares Nos. 273 and 320	15	10
Order striking out complaint	17	10
Rule for judgment	17	10
Judgment	18	11
Notice of appeal and grounds	19	11

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	Original	Print
Proceedings in Court of Errors and Appeals of New Jersey	20	12
Opinion, per curiam	20	12
Check list of justices	23	15
Judgment	23	15
Petition for appeal, assignments of error and prayer for reversal	24	15
Order allowing appeal	28	18
Bond on appeal (omitted in printing)	57	
Affidavit of service of citation	61	19
Stipulation as to transcript of record	91	20
Citation and service (omitted in printing)	94	
Certificates to record (omitted in printing)	95	
Statement of points to be relied upon and designation of parts of record to be printed	96	21

[fol. a] [Caption omitted]

[fols. 1-3]

IN SUPREME COURT OF NEW JERSEY, ESSEX COUNTY

COMPLAINT—Filed April 8, 1939

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

First Count

1. On October 1, 1928 plaintiff purchased Twenty-five (25) Prepaid Shares of the Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each for which the plaintiff paid the defendant the sum of Five thousand dollars ($5,000.00).

2. By the terms thereof the defendant agreed to pay the plaintiff Six (6) per cent per annum interest on the face value of said shares.

3. At the time said shares were purchased as aforesaid "An Act concerning Building and Loan Associations, Revision of 1925" being Pamph. L. 1925 C 65, was then in force which provided among other things as follows:

Section 49 provides as follows:

"49. How Withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in [fol. 4] case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such

withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

Section 52 of the Act provides as follows:

"52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

4. At the time said shares were purchased the Constitution of the defendant provided for withdrawal of prepaid certificates as follows:

"Article XIX. Prepaid Shares.

'Section 2.—Prepaid shares shall bear interest payable semi-annually on the First day of May and November of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any [fol. 5] regular meeting of the Association."

5. On August 17, 1932 the plaintiff gave the defendant written notice of withdrawal of said shares.

6. Thirty days thereafter plaintiff demanded of defendant payment of the withdrawal value of his said stock and interest due thereon.

7. Six months thereafter and on many other occasions said plaintiff demanded of defendant payment of the withdrawal value of his stock and interest due thereon.

8. At the time of such demands defendant had sufficient funds in cash on hand to pay the same and now has sufficient funds in cash to pay the same.

9. At the time of such demands the defendant was and still is solvent.

10. Subsequent to August 17, 1932, the date of plaintiff's withdrawal notice payments had been made by defendant upon other withdrawal applications.

11. The defendant claims to be operating under New Jersey revised statutes 17: 12-49 also 17: 12-50 Source L 1925, C 65, Sec. 49 p. 211 as amended by L. 1932. C 92 Section 1, p. 161, L 1935, C 59 Section 10 p. 152. 17: 12-53 Source L 1925. C. 65 Section 52 p. 212, as amended by L 1932, C 102 Section 1 p. 175, L 1935 C 59 Section 11, p. 153, L. 1936, C. 118 Section 4 p. 295, but all of these statutes in so far as they might effect the plaintiff's right herein are unconstitutional and within the inhibitions of Article 3 Sec. 7 paragraph 3 of the Constitution of the State of New Jersey and of Article 1 Section 10, of the Constitution of the United States of America, and of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and therefore are void insofar as the plaintiff's rights are concerned.

12. There are no legal assessments, deductions or re- [fol. 6] serves which can or should be withheld from the plaintiff and any attempt on the part of the defendant to withhold any part of the plaintiff's money under alleged color thereof or under alleged color of any order of the Commissioner of Banking and Insurance of the State of New Jersey is done in violation of Articles 3, Section 7, Paragraph 3 of the Constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and is therefore void insofar as it may effect the right of the plaintiff herein.

13. There is due and owing from the defendant on said shares the sum of Five thousand dollars, together with interest from October 5, 1932 which sum has been demanded from the defendant, but payment has been refused.

Judgment will be claimed for Five thousand dollars ($5,000.00) with interest at six per cent per annum from October 5, 1932 and costs of suit on the first count.

Second Count

1. On October 2, 1929 plaintiff purchased Seventeen and one half (17½) Prepaid shares of The Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each, for which the plaintiff paid the defendant the sum of Three thousand five hundred dollars ($3,500.00).

2. Plaintiff repeats the allegations contained in paragraph 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and make them a part of this Count.

13. There is due and owing from the defendant the sum of Three thousand, five hundred dollars ($3,500.00) together with interest from October 5, 1932 which sum has been [fol. 7] demanded from the defendant but payment has been refused.

Judgment will be claimed for the sum of Three thousand and five hundred dollars ($3,500.00) with interest at six per centum per annum from October 5, 1932 and costs of suit on the second count.

Walter P. Reilly, Attorney of Plaintiff, 790 Broad St., Newark, N. J.

In Supreme Court of New Jersey

Answer—Filed April 24, 1939

The Defendant Sixth Ward Building and Loan Association of Newark, New Jersey, a corporation, reserving all manner of objection to the Complaint herein and the right to move to strike out said Complaint at or before trial on the ground that the same does not set forth a cause of action in either of any of the counts therein set forth, for answer thereto says:

First Count

1. It admits the allegations in Paragraph 1.

2. It denies the allegations in Paragraph 2.

[fol. 8] 3. It neither admits nor denies the allegations contained in Paragraph 3 and conceives and alleges that they are argumentative and improperly alleged.

4. It admits that its constitution contained the provision "Article XIX Prepaid Shares" as set forth in Paragraph 4.

5. It admits the allegations in Paragraph 5.

6. It has no information nor knowledge of the truth of the allegations contained in Paragraph 6 and therefore neither admits nor denies the same.

7. It has no information nor knowledge of the truth of the allegations contained in Paragraph 7 and therefore neither admits nor denies the same.

8. It denies the allegations contained in Paragraph 8.

9. It admits the allegations contained in Paragraph 9.

10. It admits the allegations contained in Paragraph 10.

11. It does not answer the allegations contained in Paragraph 11 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

12. It does not answer the allegations contained in paragraph 12 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

13. It denies the allegations contained in Paragraph 13.

Second Count

1. It admits the allegations contained in Paragraph 1 of the Second Count.

2. It repeats the allegations contained in the Answer to Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and makes them a part hereof.

[fol. 9] 13. It denies the allegations contained in Paragraph 13 of the Second Count.

First Separate Defense

The plaintiff is barred from bringing the said suit against the defendant by the provisions of Revised Statutes of New Jersey, 1937—17: 12-53 as follows:

"No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall

have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; * * *"

Mulligan & Koenig, Attorneys for Defendant.

IN SUPREME COURT OF NEW JERSEY

NOTICE OF MOTION TO STRIKE ANSWER, ETC.—Filed April 29, 1939

To Mulligan & Koenig, Attorneys for Defendant, or to whom it may concern.

SIR:

Please Take Notice that I shall apply to his Honor Edwin C. Caffrey, Judge of Essex County Circuit Court, at the Court House, in Newark, on the 28th day of April, A. D. 1939, at 9.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an Order to strike out the answer filed by you and for summary judgment in favor of plaintiff on both counts, in the above entitled cause, on the ground that the allegations in paragraphs Two, Three, Six, Seven, Eight, Eleven, Twelve and Thirteen of the First Count and the said paragraphs as repeated in the Second Count are untrue in fact and sham and that the allegation contained in the first separate defense is frivolous.

[fol. 10] And take further notice that in the event that the above Motion should be denied, then I shall forthwith move that the above cause be placed on the May 1939 Commercial Calendar at the Essex Circuit.

I shall support my application by the affidavit of the plaintiff hereto attached.

Walter P. Reilly, Attorney of Plaintiff.

AFFIDAVIT OF HARRY M. VEIX

STATE OF NEW JERSEY,
County of Essex, ss:

Harry M. Veix, being duly sworn upon his oath according to law, deposes and says that:

1. He is the plaintiff in this action and is the owner of the Forty-two and one-half Prepaid Shares of the Sixth Ward Building and Loan Association of the City of Newark, New Jersey, purchased October 1, 1928 and October 2, 1929, each having a par value of Two Hundred Dollars ($200.00) each, for which deponent paid the Sixth Ward Building and Loan Association of the City of Newark, New Jersey the total sum of Eight thousand five hundred dollars ($8,500.00).

2. Deponent further states that the Sixth Ward Building and Loan Association agreed to pay deponent six per cent per annum on the face value of said shares in accordance with the terms of the prepaid Certificates issued to deponent.

3. On or about August 17, 1932 the deponent gave the [fol. 11] Sixth Ward Building and Loan Association a written notice of withdrawal of his said shares and thirty days thereafter plaintiff demanded payment and also six months thereafter demanded payment of his shares and the interest due thereon, no part of which was paid to deponent.

4. Deponent further states that there is due and owing to him the sum of Eight thousand Five hundred dollars ($8,500.00) and interest at the rate of six per cent per annum from October 5, 1932.

5. Deponent has read the answer filed by the defendant herein and believes that the allegations in paragraphs Two, Three, Six, Seven, Eight, Eleven, Twelve and Thirteen of the First Count and the said paragraphs as repeated in the Second Count are untrue in fact and sham and that the allegations contained in the first separate defense is frivolous and that the answer is filed solely for the purpose of delay.

Harry M. Veix.

Subscribed and sworn to before me this 25th day of April 1939, Joseph Schoenholz, A Master in Chancery of New Jersey.

Service of the within Notice of Motion is hereby acknowledged this 25th day of April A. D. 1939, as of time.

Mulligan & Koenig, Attorneys for Defendant.

IN SUPREME COURT OF NEW JERSEY

NOTICE OF MOTION TO STRIKE OUT COMPLAINT—Filed Nov. 21, 1939

To Walter P. Reilly, Attorney of Plaintiff, #790 Broad [fol. 12] Street, Newark, New Jersey.

DEAR SIR:

Please Take Notice that we shall apply to the Honorable Edwin C. Caffrey, sitting under the statute as Supreme Court Commissioner at the Court House in the City of Newark, on Friday the Twenty-Eighth day of April, Nineteen Hundred and Thirty-Nine at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order striking out the complaint of the plaintiff Harry M. Veix in the above entitled cause upon the following grounds:

1. The complaint does not set up facts sufficient to constitute a cause of action against the defendant herein.

2. That it appears affirmatively on the face of the complaint that the plaintiff has no legal claim against the defendant.

3. On the ground that the plaintiff has not complied with the provisions of the Revised Statutes of New Jersey, 1937—17: 12-53-e to entitle him to have a claim against the defendant.

4. On the ground that because of the reasons set forth in number 3, this Court has no jurisdiction to entertain such a claim.

Mulligan & Koenig, Attorneys of Defendant.

[fol. 13] IN SUPREME COURT OF NEW JERSEY

AFFIDAVIT ON MOTION TO STRIKE OUT COMPLAINT AND TO STRIKE OUT ANSWER—Filed May 3, 1939

STATE OF NEW JERSEY,
County of Essex, ss:

William Mattes, Jr., of full age being duly sworn according to law on his oath deposes and says:

He is and has been since March 8, 1935 Secretary of the above named defendant Association.

The plaintiff paid to the defendant Association the sum of Eighty Five Hundred Dollars as set forth in his complaint and received therefor certificates of stock of the defendant Association in the form annexed hereto. Said certificates provided as follows:

"These shares may be surrendered at any time subject to the provisions of the constitution and any amendments thereto which may hereafter be adopted."

The constitution in force at that time provided as follows:

"Article XVIII.—This constitution shall not be altered or amended except at an annual or special meeting of which due notice shall have been given and by vote of two-thirds of the stockholders present."

On May 12, 1937, the said Constitution was revised and the revision adopted at a duly convened meeting held and conducted in accordance with the previous constitution. Said revised constitution provided as follows:

"Article IX—Sec. 2. The provisions of the General Building and Loan Act as it now exists and all supplements [fol. 14] thereto and amendments and revisions thereof now existing or in the future adopted are expressly made a part of this constitution and shall be binding upon all present and future members of the association and no member rights whatsoever shall be deemed to vest except subject to such conditions."

At the time the notice of withdrawal was given by the plaintiff to the defendant Association, August 17, 1932, P. L. 1932 C. 102 (N. J. S. T. Annual 1932, Section 27-R (52)) was in force and pursuant thereto the defendant Association could not then or thereafter legally pay to the plaintiff the demand made for the shares withdrawn as the funds on hand in the defendant Association were insufficient for the purpose.

P. L. 1933 C C 48—166 and 258 (N. J. S. T. Annual 1933, Section 27-R (86) et. seq.) became effective March 10, 1933, May 11, 1933, and June 21, 1933, respectively, and by virtue of these acts the Commissioner of Banking and Insurance of this State was given power to make orders for the purpose

of conserving the assets of the building and Loan Associations of this State and pursuant thereto the said Commissioner issued orders to the defendant Association which forbade the payment of the demand made by the plaintiff for the surrender value of his shares.

Deponent further says that the said defendant Association is being conducted in all respects according to the laws of this State and the rules and orders of the Commissioner of Banking and Insurance of this State and payments to shareholders are only being made in accordance with the provisions of said laws and orders.

William Mattes, Jr.

Subscribed and sworn to before me this 27th day of April, A. D. 1939. Kathryn E. Huber, A Notary Public of New Jersey.

[fols. 15-16] Note: 2 Photostats of Certificates of Prepaid Shares Nos. 273 & 320 follow the above pleading and are attached hereto.

[fol. 17] In Supreme Court of New Jersey

Order Striking Out Complaint—Filed May 2, 1939

Plaintiff having moved to strike out the Answer filed in the above matter and Defendant, having moved to strike out the complaint in the above matter, on the ground that it disclosed no cause of action, and arguments for plaintiff and defendant, by their respective counsel, having been duly heard:

It is on this 28th day of April, 1939, on motion of Mulligan & Koenig, attorneys for defendant, ordered that the said complaint be stricken out on the ground that it disclosed no cause of action.

Edwin C. Caffrey, Circuit Court Judge, Supreme Court Commissioner.

In Supreme Court of New Jersey

Rule for Judgment—Filed May 2, 1939

The complaint in above stated cause having been stricken out by the Court without leave to the plaintiff to file an amended complaint;

It is Ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff with costs to the defendant to be taxed.

Entered May 2nd, 1939.

On Motion of Mulligan & Koenig, Attorneys.

[fol. 18] IN SUPREME COURT OF NEW JERSEY

JUDGMENT—Filed May 2, 1939

Plaintiff's motion to strike out the answer of the defendant and the defendant's motion to strike out the complaint of the plaintiff on the ground that it discloses no cause of action having come on to be heard before Edwin C. Caffrey, Circuit Court Judge, sitting as Supreme Court Commissioner, and arguments for plaintiff and for defendant by their respective counsel having been duly heard, and the court having ordered that the complaint of the plaintiff be stricken out on the ground that it discloses no cause of action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant Sixth Ward Building and Loan Association of Newark, New Jersey, a corporation do recover of the said plaintiff Harry M. Veix, its costs which have been taxed at the Costs $38.00 sum of Thirty-eight dollars.

Judgment entered and signed May 2, 1939.

Thomas J. Brogan, Chief Justice.

[fol. 19] IN SUPREME COURT OF NEW JERSEY

NOTICE OF APPEAL AND GROUNDS—Filed May 5, 1939

To: Mulligan and Koenig, Esqs., Attorneys of defendant, or to whom it may concern:

SIRS:

Please Take Notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the Last resort in all causes in New Jersey, from the whole of

the judgment entered in this cause, on the following grounds, to wit:

1. Because the Supreme Court erred in striking the complaint and entering judgment in favor of the defendant in that:

A. The Revised Statutes of New Jersey 17: 12-49, also 17: 12-50 and 17: 12-53, also L. 1933 C. 48, and the amendments and supplements thereto are unconstitutional and within the inhibitions of Article 4, Sec. 7, paragraph 3 of the Constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America, and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and therefore void insofar as the plaintiff's rights are concerned.

8. Because the Supreme Court erred in failing and refusing to strike the Answer.

C. Because the Supreme Court erred in failing and refusing to enter a summary judgment in favor of the plaintiff.

Walter P. Reilly, Attorney of Plaintiff.

Service of a copy of the within Notice of Appeal and Grounds is hereby acknowledged this 3rd day of May, A. D. 1939.

Mulligan & Koenig, Attorneys for Defendant.

[fol. 20] In Court of Errors and Appeals of New Jersey, May Term, 1939

No. 73

Harry M. Veix, Plaintiff-Appellant,

vs.

Sixth Ward Building and Loan Association of Newark, New Jersey, a Corporation, Defendant-Respondent

Submitted May Term, 1939; Decided Sep. 22, 1939

On Appeal from the Supreme Court.

For the plaintiff-appellant, Walter P. Reilly. James L. Handford, of Counsel.

For the defendant-respondent, Mulligan & Koenig.

OPINION—Filed September 22, 1939

Per CURIAM:

The complaint in the instant case was struck out on defendant's motion and from the judgment entered thereon the plaintiff appeals.

In this suit at law the plaintiff sought to recover the face value and interest of twenty-five prepaid shares of the defendant building and loan association stock purchased on Oct. 1, 1928, and also the face value and interest of an additional seventeen and one-half shares of like stock purchased a year later.

Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17: 12-2, et seq. At that time the 1925 statute, supra, provided, inter alia, that the owner of such stock might have same redeemed for cash by giving a thirty day notice in writing and that such withdrawal should be paid by the association in the order in which notice had been received. On August 17, 1932, the plaintiff gave the defendant such written notice of withdrawal and, after the lapse of thirty days, demanded payment. But prior thereto the Legislature had amended the 1925 statute by [fol. 21] Chapter 102, P. L. 1932; R. S. 17: 12-53.

The plaintiff-appellant says that the 1932 statute is invalid and the burden of the argument is that that statute is unconstitutional because it impairs the obligation of the contract, but we have already held to the contrary in the case of Bucsi vs. Longworth B. & L. Assn., 119 N. J. L. 120, and Rocker vs. Cardinal B. & L. Assn., 119 Id. 134, and this appeal is entirely controlled by our holding in those cases.

The judgment under review will be affirmed.

[File endorsement omitted.]

IN COURT OF ERRORS AND APPEALS

OF NEW JERSEY

May Term, 1939

Appeal from Supreme *Court*

~~[illegible]~~ ~~Court~~

Harry M. Veix,

Appellant,

and

Sixth Ward B. & L. Assn. of Newark, N. J. Respondents,

No. 73 *of* May *Term, 1939*

Date Sep 22, *1939*

The Chancellor *presiding.*

Opinion ~~by~~ Per Curiam

CHECK LIST	Affirm	Reverse	Modify
The Chancellor	X		
" Chief Justice	X		
Mr. Justice ~~[illegible]~~			
" " Parker	X		
" " Case	X		
" " Bodine	X		
" " Donges	X		
" " Heher	X		
" " Perskie	X		
" " Porter	X		
Judge Hetfield	X		
" Dear	X		
" Wells	X		
" WolfsKeil	X		
" Rafferty	X		
" Hague	X		
-22- Totals			

[fol. 23] In Court of Errors and Appeals of New Jersey, May Term, 1939

Between

Harry M. Veix, Plaintiff-Appellant,

vs.

Sixth Ward Building and Loan Association of Newark, New Jersey, a Corporation, Defendant-Respondent

On Appeal from Supreme Court

Judgment—September 22, 1939

This cause having been duly argued at the May Term, 1939 of this court by Walter P. Reilly and James L. Handford of counsel for the appellant and Mulligan & Koenig, by George D. Mulligan of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Twenty-second day of September in the year of our Lord one thousand nine hundred and Thirty-nine, ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Mulligan & Koenig, Attorneys for Respondent.

A True Copy. Thomas A. Mathis, Clerk.

[fol. 24] Supreme Court of the United States

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed November 3, 1939

Petition for Appeal

Considering himself aggrieved by the final decision of the Court of Errors and Appeals In the Last Resort In All

Causes in the State of New Jersey in the above entitled cause, the highest court of said State in which a decision in the above entitled cause should be had, the appellant therein, Harry M. Veix, of the City of Newark, New Jersey, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an Order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

Now comes the appellant above named and files herewith his petition for appeal and says that there are errors in the records and proceedings of the above entitled cause and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

1. The New Jersey Court of Errors and Appeals erred in failing to hold that 1937 Revised Statutes of New Jersey 17:12-53—source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 [fol. 25] Chapter 118 section 4, page 295 impaired the obligation of an existing contract between the appellant and the appellees in violation of Article 1, Section 10 of the Constitution of the United States.

2. The New Jersey Court of Errors and Appeals erred in failing to hold that said 1937 Revised Statutes of New Jersey 17:12-53 source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 deprived the appellant of his property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in failing to hold that said 1937 Revised Statutes 17:12-53 —source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11

page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 denied to the appellant the equal protection of the Laws in violation of Section one of the 14th Amendment to the Constitution of the United States.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17:12-53—source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, [fol. 26] page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it impaired the obligation of appellant's contract with the appellees in violation of Article 1, Section 10 of the Constitution of the United States.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17: 12-53—source New Jersey Pamphlet Laws of 1925 Chapter 65 Sections 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it deprived the appellant of property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

6. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17: 12-53—source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it denied the appellant the equal protection of the Laws in violation of Section 1 of the 14th Amendment to the Constitution of the [fol. 27] United States.

7. The New Jersey Court of Errors and Appeals erred in not holding that 1937 Revised Statutes of New Jersey 17 : 12-53—source New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118, Section 4, page 295 to be an unreasonable invasion of the rights of property and an unreasonable impairment of the contract obligation under the guise of police powers, and therefore unconstitutional.

PRAYER FOR REVERSAL

For which errors the appellant Harry M. Veix prays that the said judgment of the New Jersey Court of Errors and Appeals, which was entered on September 22, 1939 in the above entitled cause be reviewed by the Supreme Court of the United States and reversed and a judgment entered in favor of the appellant and for costs.

Walter P. Reilly, Attorney for Appellant.

Walter P. Reilly, Of Counsel with Appellant, James L. Handford, Of Counsel with Appellant.

Endorsed on this petition is the following: The within petition is denied, solely on the ground of lack of jurisdiction.

Luther A. Campbell, C. & P. J. Errors and Appeals Court of N. J.

[fols. 28-56] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 3, 1939

The appellant in the above entitled cause, having prayed for the allowance of an appeal in said cause to the Supreme Court of the United States from the judgment entered in the New Jersey Court of Errors and Appeals In The Last Resort In All Causes on the Twenty-second day of September, 1939 and from each and every part thereof, and having presented and filed his petition for appeal, assignment of

errors, prayer for reversal and statement, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the New Jersey Court of Errors and Appeals In The Last Resort In All Causes, in the above entitled cause, as provided by law, and it is further Ordered that the Clerk of the New Jersey Supreme Court, to which Court the record in said cause has been remitted, shall prepare and certify a transcript of the record, proceedings and judgment in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

And it is further Ordered that security for Costs on appeal be fixed in the sum of $100.

Dated this 1st day of November 1939.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[fols. 57-60] Bond on Appeal for $100.00 approved and filed Nov. 15, 1939, omitted in printing.

[fols. 61-90] SUPREME COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF SERVICE—Filed November 3, 1939

STATE OF NEW JERSEY,
County of Essex, ss:

Walter P. Reilly of full age being duly sworn according to law on his oath deposes and says I am the attorney for the appellant Harry M. Veix, in the above entitled cause; that on November 2, 1939, I served the Citation in the above entitled matter issued on November 1, 1939, upon Mulligan and Koenig, attorney for the appellee by exhibiting the same personally to George D. Mulligan, a member of said law firm and explaining to him the contents thereof and leaving with him a true copy of same.

Walter P. Reilly.

Subscribed and sworn to before me this 3rd day of November, A. D. 1939. Herbert H. Meyer, An Attorney at Law of New Jersey.

[fol. 91] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed November 17, 1939

It is hereby stipulated and agreed by and between Walter P. Reilly, attorney for the appellant, and George D. Mulligan; attorney for the appellee, that the Clerk of the New Jersey Supreme Court shall prepare his transcript of the record to include the following, but without the caption:

Summons.

Complaint.

Demand for Affidavit of Merits.

Answer.

Notice of Motion.

Affidavit of Harry M. Veix.

Notice of Motion to Strike Complaint.

Affidavit on motion to Strike Complaint and to Strike Answer.

Photostat copy of Certificate No. 273 for 25 shares of Prepaid stock of appellee's association.

Photostat copy of Certificate No. 320 for 17½ shares of prepaid stock of appellee's association.

Order Striking Complaint.

Rule for Judgment in New Jersey Supreme Court and Judgment.

Notice of Appeal and Grounds to New Jersey Court of [fols. 92-93] Errors and Appeals.

Opinion in New Jersey Court of Errors and Appeals and Check List of Justices in Court of Errors and Appeals.

Remittitur from New Jersey Court of Errors and Appeals to New Jersey Supreme Court.

Petition of Appeal to the Supreme Court of the United States and all papers in connection with the Appeal, Statement of matter of ground making against that Jurisdiction of this Court asserted by the Appellant and Motion by Appellee to Dismiss, including this Stipulation.

Walter P. Reilly, Attorney for Appellant. George D. Mulligan, Attorney for Appellee.

[fol. 94] Citation in usual form showing service on Mulligan & Koenig filed Nov. 3, 1939 omitted in printing.

[fol. 95] Certificates to record omitted in printing.

[fol. 96] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 4, 1939

Comes now the appellant and adopts his assignments of error as his statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case, excepting the following be omitted:

1. Summons (R. 1).
2. Return of Sheriff (R. 2).
3. Demand for Affidavits of Merits (R. 7).
4. Form of typewritten stock certificate (R. 17).

Walter P. Reilly, Counsel for Appellant. James L. Handford, Of Counsel for Appellant.

Dated December 2, 1939.

[fol. 97] Service of a copy of the within Statement of Points &c. is hereby acknowledged this 2nd day of December, A. D. 1939.

George D. Mulligan, Counsel for Appellee.

[fol. 98] [File endorsement omitted.]

Endorsed on cover: File No. 43,974. New Jersey, Supreme Court. Term No. 567. Harry M. Veix, Appellant, vs. Sixth Ward Building and Loan Association of Newark, New Jersey. Filed December 4, 1939. Term No. 567 O. T. 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION

WALTER P. REILLY,
JAMES L. HANDFORD,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
State statute the validity of which is involved	3
Date of the judgment and application for appeal	5
Nature of the case and rulings below	5
Cases believed to sustain jurisdiction	14
Exhibit "A"—Per curiam opinion of the New Jersey Court of Errors and Appeals	15
Exhibit "B"—Opinion of October 26, 1937 of the New Jersey Court of Errors and Appeals	16
Exhibit "C"—Opinion of the New Jersey Court of Errors and Appeals in the case of *Rocker* v. *Cardinal Building & Loan Association of the City of Newark*	30

Table of Cases Cited.

Adams v. *Russell*, 229 U. S. 353	12
Americus Sugar Ref. Co. v. *State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102	14
Bucsi v. *Longworth Building and Loan Association*, 119 N. J. Law 120, 194 Atl. 857	10, 11
Detroit United Railway v. *Michigan*, 242 U. S. 238	13
Kansas City Southern Ry. Co. v. *Road Impt. Dist. No. 3*, 266 U. S. 379, 69 L. Ed. 335	14
Louisville & N. R. Co. v. *Melton*, 218 U. S. 36, 54 L. Ed. 921	14
Mulhern v. *Moffatt Tunnel Imp. District*, 262 U. S. 710, 67 L. Ed. 1194	14
Rocker v. *Cardinal Building & Loan Association*, 13 N. J. Mis. 411, 179 A. 674, 119 N. J. L. 134, 194 A. 865	10, 11
Treigle v. *Acme Homestead Association*, 297 U. S. 189, 56 Sup. Ct. Rep. 408, 80 L. Ed. 391	11, 14

STATUTES CITED.

Act of January 31, 1928 (45 Stat. 54), as amended by the Act of April 26, 1928 (45 Stat. 466) 2, 3, 12
Constitution of the United States, Article I, Section 10 ..... 2, 12
Constitution of the United States, Fourteenth Amendment, Section 1 ..... 2, 12
Judicial Code, Section 237(a) (28 U. S. C. A. 344) 2, 12
New Jersey Pamphlet Laws of 1925, Chap. 65, Section 49 6
New Jersey Pamphlet Laws of 1925, Chap. 65, Section 52, page 212 ..... 1, 3, 5, 8, 9, 10, 12
New Jersey Pamphlet Laws of 1932, Chap. 102, Section 1, page 175, approved April 22, 1932 ..... 1, 3, 8, 9, 10, 12
New Jersey Pamphlet Laws of 1935, Chapter 59, Section 11, page 153 ..... 1, 2, 3, 5, 8, 9, 10, 12
New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295 ..... 2, 3, 5, 8, 9, 10, 12
Revised Statutes of New Jersey, 1937, 17: 12-53, ... 1, 3, 8, 9, 10, 12
Rules of the Supreme Court of the United States, Rule 46, Par. 2 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION,

Appellee.

STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 12, paragraph 1 of the Rules of the Supreme Court of the United States, Harry M. Veix, for appeal herein files this statement showing the basis upon which he contends the Supreme Court of the United States has jurisdiction to review the judgment and decree of the New Jersey Court of Errors and Appeals herein.

This case is one in which the validity of a statute of the State of New Jersey, to wit, 1937 Revised Statutes of New Jersey 17: 12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chap-

ter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118, Section 4, page 295, is drawn in question upon the ground that the statute is repugnant to Article I, Section 10 of the Constitution of the United States and also repugnant to Section 1 of the 14th Amendment to the Constitution of the United States. The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, the highest court of said State in which a decision in the above entitled cause could be had, is in favor of the validity of said statute. Therefore, in accordance with Rule 46, paragraph 2 of the Rules of the Supreme Court of the United States (28 U. S. C. A.) the appellant respectfully shows that this case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. 54), as amended by the Act of April 26, 1928 (45 Stat. 466), was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344), a review could be had in the Supreme Court of the United States on writ of error.

Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344).

> "Sec. 237 (a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the grounds of its being repugnant to the Constitution * * * of the United States and the decision is in favor of its validity may be reviewed by the Supreme Court upon a Writ of Error."

Act of January 31, 1928 (45 Stat. 54)

> "All relief which heretofore could be obtained by Writ of Error shall hereinafter be obtainable by appeal * * * the review of judgments of State Courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such Courts."

Act of April 26, 1928 (45 Stat. 466)

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandates shall be applicable to the appeal which the preceding section substitutes for a writ of error."

As stated above, the Statute of New Jersey, the validity of which is involved in this case is 1937 Revised Statutes of New Jersey 17: 12-53 *source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295, which Statute reads as follows:

"53. Payment of maturities and withdrawals. Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawals have been filed, except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean moneys, other than borrowed moneys, received by any such association less moneys used for operating

expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall so far as possible, pay out of such funds on account of the sum due to each member, who has filed notice or notices of withdrawal, without regard to the fact that such notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars, or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and, in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds

of such association shall be applied as required by this section; and

f. The board of directors of any such association shall have the right, in its discretion, to make available additional funds other than those required in paragraph "c" of this section for the payment of maturities and withdrawals; but no more than one-third of the net receipts as defined in said paragraph "c" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid. (17: 12-53)

Source L 1925, c. 65, Sec. 52 p. 212, as amended by L. 1932 c. 102, Sec. 1, page 175 L. 1935, c. 59 Sec. 11 p. 153, L. 1936 c. 118 Sec. 4, p. 295.

Judgment in this case was entered by the New Jersey Court of Errors and Appeals on September 22, 1939 and the petition for appeal which this statement accompanies is being presented on October 30th, 1939.

The facts, all of which were set forth in the complaint filed in the New Jersey Supreme Court, being the court of first instance in this cause, are as follows:

On October 1, 1928 appellant purchased twenty-five prepaid shares and on October 2, 1929 seventeen and one-half prepaid shares of the Sixth Ward Building and Loan Association of Newark, N. J. the appellee herein, of a par value of $200.00 each, for which the appellant paid the appellee the sum of $8500.00.

By the terms of the certificates issued to the appellant therefor, the appellee agreed to pay the appellant six (6) per cent per annum interest on the face value of said shares.

At the time the said shares were purchased as aforesaid the New Jersey Statute, Pamphlet Laws of New Jersey, 1925 Chapter 65, provided that the shares may be withdrawn at any time by giving such written notice as the con-

stitution or by-laws of the association provided, not to exceed thirty days and that in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any court of competent jurisdiction if the same is not paid in six months from the date of the giving of said notice of withdrawal.

The said statutes are as follows:

Pamphlet Laws of New Jersey 1925—Chapter 65, was then in force which provided among other things as follows:

Section 49 provides as follows:

"49. How Withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

Section 52 of the Act provides as follows:

"52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the pay-

ment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of giving of said notice of withdrawal."

At the time said shares were purchased the constitution of the appellee Building and Loan Association provided for the withdrawal of prepaid certificates, with interest, upon giving thirty days written notice as follows:

ARTICLE XIX. Prepaid shares.

Section 2. Prepaid shares shall bear interest payable semi-annually on the First day of May and November of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving thirty days written notice prior to any regular meeting of the Association.

On August 17, 1932 the appellant gave the appellee Building and Loan Association written notice of withdrawal of said shares, thirty days thereafter, six months thereafter and on many other occasions he demanded payment of the withdrawal value with interest, but payment was refused.

At the time such demands were made, the appellee Building and Loan Association had sufficient funds in cash on hand to pay the same.

At the time such demands were made the appellee Building and Loan Association was and still is solvent.

The complaint filed in the New Jersey Supreme Court, which was the court of first instance in the cause, alleges, as follows:

"11. The defendant claims to be operating under New Jersey Revised Statutes 17: 12-49 also 17: 12-50

Source L 1925 C. 65, Sec. 49, p. 211 as amended by L 1932, C 92 Section 1 p. 161 L. 1935, C 59 Section 10 p. 152. 17: 12-53 Source L 1925, C. 65, Section 52 p. 212, as amended by L 1932, C 102 Section 1 p. 175, L 1935 C 59 Section 11, p. 153, L 1936, C 118 Section 4 p. 295, but all of these statutes in so far as they might effect the plaintiff's right herein are unconstitutional and within the inhibitions of Article 4 Sec. 7 paragraph 3 of the Constitution of the State of New Jersey and of Article 1 Section 10, of the Constitution of the United States of America, and of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and therefore are void insofar as the plaintiff's rights are concerned.

12. There are no legal assessments, deductions or reserves which can or should be withheld from the plaintiff and any attempt on the part of the defendant to withhold any part of the plaintiff's money under alleged color thereof or under alleged color of any order of the Commissioner of Banking and Insurance of the State of New Jersey is done in violation of Articles 4, Section 7, Paragraph 3 of the constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and is therefore void insofar as it may effect the right of the plaintiff herein."

The appellee association framed its answer setting up as a defense 1937 Revised Statutes of New Jersey 17: 12-53—*source* New Jersey Pamphlet Laws of 1925, Chapter 65, Section 52, page 212; New Jersey Pamphlet Laws of 1932, Chapter 102, Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935, Chapter 59, Section 11, page 153 and New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295.

The appellant moved to strike the answer on the ground that it failed to set up a defense and based his argument on the same contention that 1937 Revised Statutes of New Jer-

sey 17: 12-53—*source* New Jersey Pamphlet Laws of 1925, Chapter 65, Section 52, page 212; New Jersey Pamphlet Laws of 1932, Chapter 102, Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935, Chapter 59, Section 11, page 153 and New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295 was unconstitutional. The appellee urged that the said Act was constitutional and that the defense created by the act should bar the appellant's action. The trial court upheld the constitutionality of 1937 Revised Statutes of New Jersey 17: 12-53—*source* New Jersey Pamphlet Laws of 1925, Chapter 65, Section 52, page 212; New Jersey Pamphlet Laws of 1932, Chapter 102, Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59, Section 11, page 153 and New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295, and following the common law rule on demurrers struck the complaint as the first pleading defective thereunder. The only question raised or argued by either party in the courts below was the constitutionality of said 1937 Revised Statutes of New Jersey 17: 12-53—*source* New Jersey Pamphlet Laws of 1925, Chapter 65, Section 52, page 212; New Jersey Pamphlet Laws of 1932, Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935, Chapter 59, Section 11, page 153 and New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295.

The Federal questions here sought to be reviewed were raised and argued in both of the Tribunals of the State of New Jersey passing upon the case. The question was presented in the first instance to the Circuit Court Judge of the State of New Jersey sitting as Supreme Court Commissioner in the New Jersey Supreme Court. The judgment from which the appeal was taken was entered on an oral motion to strike the complaint as failing to set up a cause of action under 1937 Revised Statutes of New Jersey

17:12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295.

On appeal to the New Jersey Court of Errors and Appeals these same points were argued, and the New Jersey Court of Errors and Appeals passed squarely on the constitutional question presented relying on the cases of *Bucsi* v. *Longworth Building and Loan Association,* a corporation, 119 N. J. Law 120, 194 Atl. 857 and *Rocker* v. *Cardinal Building & Loan Association,* 13 N. J. Mis. 411, 179 A. 674, affirmed by the Court of Errors and Appeals, 119 N. J. L. 134, 194 A. 865. The New Jersey Court of Errors and Appeals sustained the constitutionality of 1937 Revised Statutes of New Jersey 17:12-53 *source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4 page 295, as follows:

> "The plaintiff-appellant says that the 1932 statute is invalid and the burden of the argument is that that statute is unconstitutional because it impairs the obligation of the contract, but we have already held to the contrary in the case of Bucsi *v.* Longworth Building and Loan Association 119 N. J. L. 120 and Rocker *v.* Cardinal B. & L. Association, 119 Id. 134, and this appeal is entirely controlled by our holding in those cases."

The opinion is not yet officially reported but will be found in 8 Atlantic Reporter 2nd Series, page 350 and a copy of same is hereto attached.

A copy of the opinion in the case of *Bucsi* v. *Longworth Building and Loan Association* is reported in 119 N. J. L. 120, 194 Atlantic 857 and of the opinion in *Rocker* v. *Cardinal B. & L. Association,* 119 Id. 134 also is attached hereto.

Grounds of appeal before the Court of Errors and Appeals squarely raised the constitutional questions as follows:

1. Because the Supreme Court erred in striking the complaint and entering judgment in favor of the defendant in that:

A. The Revised Statutes of New Jersey 17: 12-49 also 17: 12-50 and 17: 12-53, also L 1933 C. 48, and the amendments and supplements thereto are unconstitutional and within the inhibitions of Article 4, Sec. 7 paragraph 3 of the Constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America, and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and therefore void insofar as the plaintiff's rights are concerned.

B. Because the Supreme Court erred in failing and refusing to strike the Answer.

C. Because the Supreme Court erred in failing and refusing to enter a summary judgment in favor of the plaintiff.

The constitutional questions were argued before the Court of Errors and Appeals as well as before the Supreme Court.

The Supreme Court of the United States on February 3, 1936, decided the case of *Treigle* v. *Acme Homestead Association* as Case #287, October Term, 1935. The unanimous opinion of the court was delivered by Mr. Justice Roberts and is reported in 297 U. S. 189, 56 Supreme Court Reports, 408, 80 L. Ed. 391. In this decision the Supreme

Court of the United States held a comparable statute of Louisiana unconstitutional as impairing the obligation of contracts and destroying vested rights in contravention of Article 1, Section 10, and Amendment XIV Section 1 of the Constitution.

On the basis of the foregoing history of the case, it is submitted that at every step the validity of the New Jersey Statute, 1937 Revised Statutes of New Jersey 17: 12-53 *source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52 page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11 page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295, was called in question on the ground of its being repugnant to the Constitution of the United States and the decision being in favor of the statute's validity, an appeal should be allowed under Section 237 (a) of the Judicial Code (28 U. S. C. A. 344), as modified by the Act of January 31, 1928, (45 Stat. 54) and the amendment of April 26, 1928 (45 Stat. 456). The Federal questions were presented for decision and their decision was necessary to the determination of the cause. Although the order of the New Jersey Supreme Court striking the complaint does not expressly state that the Federal questions were actually decided, the complaint which was stricken squarely raises them, the Federal questions were argued, and the judgment as rendered could not have been rendered without deciding the Federal questions presented. *Adams* v. *Russell*, 229 U. S. 353, 360.

Moreover, the Court of Errors and Appeals decided this case at bar solely on the constitutional grounds and in its decision in *Bucsi* v. *Longworth Building and Loan Association* expressly refers to Article 1, Section 10 of the Constitution of the United States and the 14th Amendment, Section 1, thereof.

It is further submitted that the questions involved are substantial. When the United States Supreme Court is called upon to decide whether State legislation impairs the obligation of a contract, the questions are:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

Detroit United Railway v. *Michigan* 242 U. S. 238, 249.

Under the decision of the United States Supreme Court in the case of *Treigle* v. *Acme Homestead Association* (*supra*) when compared with opinion of the New Jersey Court of Errors and Appeals in the instant case and in the case of *Bucsi* v. *Longworth Building and Loan Association* (*supra*), there seems to be no room for argument as to the answers to these queries. There was a definite contract between appellant and the appellees, the terms of which were clearly defined by the previous statutes. It was granted by the New Jersey Courts that the obligation of this contract was impaired but they said the impairment was justified under the police power. The New Jersey courts held, as did the Supreme Court of Louisiana in the *Treigle* case, that the statute was passed for an end, which was in fact public. However, as was pointed out in the next to the last paragraph of the opinion of the United States Supreme Court in the *Treigle* case, the questioned section deals only with private rights and deprives withdrawing members of solvent associations of existing contract rights for the benefit of those who remain. It impairs the obligation of appellant's contracts and arbitrarily deprives him of vested property rights without due process of law. The appellant contends that the statute in question cannot be

distinguished from the Louisiana statute which was held unconstitutional in the *Treigle* case and cannot be upheld under the police power. This is a substantial question, particularly in view of the fact that this is not an emergency act having only temporary application, but becomes a permanent part of the New Jersey statutory law, drastically affecting appellant's contracts and his vested property rights.

The following are cases believed to sustain the jurisdiction:

Treigle v. *Acme Homestead Assn.*, 297 U. S. 189, 56 Sup. Court Rep. 408, 80 L. Ed. 391;

Americus Sugar Ref. Co. v. *State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102;

Kansas City Southern Ry. Co. v. *Road Impt. Dist. No. 3*, 266 U. S. 379, 69 L. Ed. 335;

Louisville & N. R. Co. v. *Melton*, 218 U. S. 36, 54 L. Ed. 921;

Mulhern v. *Moffatt Tunnel Imp. District*, 262 U. S. 710, 67 L. Ed. 1194.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted.

WALTER P. REILLY,
Attorney for Appellant.

WALTER P. REILLY,
Counsel for Appellant.
JAMES L. HANDFORD,
Counsel for Appellant.

EXHIBIT A

NEW JERSEY COURT OF ERRORS & APPEALS No. 73, MAY TERM, 1939.

HARRY M. VEIX, Plaintiff-Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a Corporation, Defendant-Respondent

Submitted May Term, 1939; decided Sep. 22, 1939.

On Appeal from the Supreme Court.

For the plaintiff-appellant, Walter P. Reilly. James L. Handford, of Counsel.

For the defendant-respondent Mulligan & Koenig.

Per CURIAM.

The complaint in the instant case was struck out on defendant's motion and from the judgment entered thereon the plaintiff appeals.

In this suit at law the plaintiff sought to recover the face value and interest of twenty-five prepaid shares of the defendant building and loan association stock purchased on Oct. 1, 1928, and also the face value and interest of an additional seventeen and one-half shares of like stock purchased a year later.

Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17: 12-2, et seq. At that time the 1925 statute, supra, provided, inter alia, that the owner of such stock might have same redeemed for cash by giving a thirty day notice in writing and that such withdrawal should be paid by the association in the order in which notice has been received. On August 17, 1932, the plaintiff gave the defendant such written notice of withdrawal and, after the lapse of thirty days, demanded payment. But prior thereto the Legislature had amended the 1925 statute by Chapter 102, P. L. 1932; R. S. 17: 12-53.

The plaintiff-appellant says that the 1932 statute is invalid and the burden of the argument is that that statute

is unconsitutional because it impairs the obligation of the contract, but we have already held to the contrary in the case of Bucsi *v.* Longworth B. & L. Assn., 119 N. J. L. 120, and Rocker *v.* Cardinal B. & L. Assn., 119 Id. 134, and this appeal is entirely controlled by our holding in those cases.

The judgment under review will be affirmed.

Endorsed: "Filed Sep. 22, 1939. Thomas A. Mathis, Clerk."

EXHIBIT B

New Jersey Court of Errors and Appeals. May Term, 1935.

No. 57.

Rose Bucsi, Plaintiff-Appellant,

vs.

Longworth Building & Loan Association, Defendant-Respondent.

Submitted May Term, 1935, re-argued as No. 1, May Term, 1936. Decided October 26, 1937.

Syllabus.

1. P. L. 1932, Chap. 102, cannot strictly be classed as emergency legislation because it is not limited in its existence to the period of any emergency but forms a permanent part of the statutes, relating to and regulating building and Loan Associations.

2. This court takes judicial notice of what was common knowledge at the time of the adoption of said legislation, namely, that a great emergency existed respecting the financial affairs of building and loan associations throughout the State, which was of great public interest adversely affecting, directly and indirectly the financial affairs of all the people.

3. When such a situation exists it calls for the exercise by the legislature of the reserved or police power of the State to adopt correcting and relieving legislation, even

though contracts previously entered into may thereby be affected.

4. It is well settled that the constitutional interdiction against statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, but the exercise of such powers is subject to the limitation that it must be reasonable under the conditions and the legislation must have a substantial relation to its object and must not be arbitrary or discriminatory.

5. P. L. 1932, Chap. 102, is a constitutional legislative enactment.

Appeal from Supreme Court, Essex County Circuit.

For plaintiff-appellant: John A. Bolger.

For defendant-respondent: John Warren, David J. Wilentz, Attorney General, Amicus Curiae; Louis J. Cohen, Assistant Attorney General, of counsel.

The opinion of the court was delivered by the Chancellor.

An action was brought for the purpose of recovering the withdrawal value of ten installment shares of the stock held by the plaintiff-appellant in the Niagara Building and Loan Association, which on December 31, 1932, was consolidated and merged with the Longworth Building and Loan Association, the defendant-respondent. This stock was subscribed for June 17, 1919. Written notice of withdrawal was given on June 15, 1931, and on subsequent dates prior to October 15, 1931, and the action in question was commenced January 19, 1934. In her complaint the appellant rested her right on action upon the ground that she was entitled to payment according to the terms and provisions of the statute existing at the time she subscribed for the shares in question. This was P. L. 1903 p. 457. The statute in effect at the time she gave notice of her withdrawal was P. L. 1925, Chap. 65. The terms and provisions of both of these statutes, as to the question of withdrawal, are, to all intents and purposes, alike.

Between the date of giving her notice of withdrawal and the commencement of her suit P. L. 1932, Chap. 102, and P. L. 1933, Chaps. 48, 166 and 258 had been adopted and become effective. P. L. 1932, Chap. 102 became effective April 22, 1932, and P. L. 1933, Chaps. 48, 166 and 258 became effective March 10, 1933, May 11, 1933 and June 21, 1933, respectively.

The appellant appears to contend that whether the act of 1903 or 1925, supra, controlled, she was entitled to have her action December 15, 1931.

In its answer the defendant-respondent pleaded, among other things, all of these statutes and certain orders of the Commissioner of Banking and Insurance issued pursuant to the 1933 acts, and reserved the right to move to strike the complaint as not setting up a cause of action. Plaintiff-appellant moved to strike the answer and upon the coming on of the hearing of such motion before the Circuit Court judge, sitting under the statute, as a Supreme Court Commissioner, the defendant-respondent moved to strike the complaint and prevailed and from the judgment entered the plaintiff below appeals and urges and argues four grounds for reversal:

1. That P. L. 1932, Chap. 102 is not retrospective.

2. That P. L. 1932, Chap. 102, if not retrospective is unconstitutional.

3. That P. L. 1932, Chap. 102 is not an emergency act.

4. That orders issued by the Commissioner of Banking and Insurance issued under P. L. 1933 Chap. 48, 166 and 258 are invalid and without effect and the statutes are unconstitutional as being an improper delegation of legislative powers.

Counsel for appellant concedes in his brief that if P. L. 1932 Chap. 102, supra, or the orders of the Commissioner of Banking and Insurance issued under the 1933 statutes, supra, are controlling, then appellant's complaint failed to state a cause of action.

The first three points urged for reversal can, most conveniently, be considered together.

First it is urged that the 1932 act is not emergency legislation because it does not recite the existence of an emergency and is not limited in its existence to the period of any emergency but forms a permanent part of the statutes relating to and regulating building and loan associations. This, in the cause before us, is not necessary. A legislative declaration of the existence of an emergency is entitled to judicial consideration but the courts must be guided by what is common knowledge. Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. Rep. 231, 78 L. Ed. 413.

Further, an emergency does not create or bestow legislative power, not otherwise constitutional existing, but it may furnish the occasion and necessity for the exercise of such power. Home Building and Loan Association v. Blaisdell, supra; People v. Title Mortgage and Guaranty Co. 264 N. Y. 69, 190 N. E. 153, 156; Hourigan v. North Bergen, 113 N. J. L. 143, 151.

It must be noted that this statute does not, by its terms, limit its operation to the period of an existing emergency and this reason takes it out of the class of mere emergency legislation—so called. But it is unnecessary to sustain the statute on the temporary ground that it is an emergency statute, because it is sustainable on broad constitutional grounds, as a valid exercise of the reserved power of the State. This so-called reserved power is generally referred to as the police power of the State and extends to all great public needs. Noble State Bank v. Haskell 219 U. S. 104, 110; 55 L. Ed. 112; 31 Sup. Ct. Rep. 486. What are the police powers of the State?

Mr. Justice Taney, in The License Cases 5 Howard 504, 583; 12 L. Ed. 256, 291, said:

"They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits

of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States."

Nebbia v. New York, 291 U. S. 502, 524, 78 L. Ed. 940; 54 Sup. Ct. Rep. 505.

It is well settled, however, that the constitutional interdiction against statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into may thereby be affected. Home Building and Loan Association v. Blaisdell, supra, p. 437; Manigault v. Springs, 199 U. S. 473; 50 L. Ed. 274; 26 Sup. Ct. Rep. 127. But the exercise of such powers is subject to the limitation that it must be reasonable under the conditions and the legislation must have a substantial relation to its object and must not be arbitrary or discriminatory. Wolf Packing Co. v. Court of Industrial Relations 262 U. S. 522, 535; 43 Sup. Ct. Rep. 630, 67 L. Ed. 1103; Nebbia v. New York 291 U. S. 502, p. 535; 54 Sup. Ct. Rep. 505; 78 L. Ed. 940.

This power is an attribute of sovereignty and all contracts are subject to its future exercise, and not only existing laws but also laws resulting from the exercise of this reserved power are read into and made a part of all contracts. Home Building and Loan Association v. Blaisdell, supra; Norma v. Baltimore and Ohio Railroad Co. et als. 294 U. S. 240; 70 L. Ed. 885; 55 Sup. Ct. Rep. 407; Houriran v. North Bergen, supra; People v. Title Mortgage and Guaranty Co. supra.

It is a matter of such common knowledge as to require judicial notice that the operation of building and loan associations in this State during the latter part of the last century had been so loose and utterly devoid of any consideration of the purpose of which they were created and the rights of the subscribing members that the situation was a public scandal and called for action on the part of

our legislature. The legislature of 1903 undertook their regulation, P. L. 1903, p. 457. The need of regulation in the public interest was obvious and the statute was enacted for the protection of the public savings under the inherent police power of the State.

An examination of the statute clearly evidences the intention of that legislature to strictly regulate the business of these associations and the statute contemplated throughout its provisions the central ideal of cooperation, equality and mutuality upon the part of the members of the association. Fitzgerald v. State Mutual Building and Loan Assn. 76 N. J. Eq. 137, 143.

Prior to the enactment of this statute the remedy of a withdrawing member for non-payment was not at law. Campbell v. Perth Amboy Mutual Loan, etc. Assn. (1901) 67 N. J. L. 71. Section 39 of the statute provided:

"Withdrawals shall be paid in the order in which the notices thereof are received, but not more than one-half the receipts of any one month shall be required to be used for payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a longer period than six months from the date of such notice, and any shareholder who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

But the statutory right of a member to withdraw from membership and to receive the withdrawal value of his shares and the statutory privilege to sue for the amount if not paid within the time named in the statute, is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and the statute does not contemplate that the privileges named shall be exercised to defeat equal participation, but that the spirit of the statute being equal participation, the paramount equity is equal participation at all times. Fitzgerald v. State Mutual Building and Loan Assn. supra. p. 145.

As pointed out, the statute in force, when the appellant subscribed for her stock was P. L. 1925, Chap. 65, Sec. 52, p. 212 (Revision of 1925). This was practically identical with P. L. 1903 Chap. 218, Sec. 39, p. 471 (1 C. S. 347). The statute provides that withdrawals may be made at any time upon written notice required by the constitution of the association but not exceeding thirty (30) days: the withdrawals to be paid in the order received, but not more than one-half the receipts of any one month shall be used without the consent of the board of directors until the oldest unpaid claim shall have been on file six months; and, in no case is payment to be postponed beyond six months from date of notice and if so the holder may sue for and recover the withdrawal value of his shares.

P. L. 1925, Chap. 65, Sec. 52, p. 212, was amended by the statute in question P. L. 1932, Chap. 102, Sec. 52, p. 175. This now provides that withdrawals shall be paid in the order of notice, but not more than one-half of the receipts of any one month, from the funds received as income on investments authorized by Sec. 26 of the statute shall be required to be so used except as approved by the board of directors. It is to be noted that, for the first time, the term "receipts" is defined by statute. The statute further provides, however, that if in any month the above funds, plus any others made available by the directors, is not sufficient to pay all the withdrawals the right of priority of payment shall be only to the extent of $500 and if all withdrawing members have been paid in full to the extent of $500 and there is still a balance available, then the order of priority to the extent of $500.00 shall continue to apply until the funds are exhausted; and no withdrawals shall be paid if there are not funds sufficient to pay the matured shares on which payment has been requested thirty days after maturity. Under the statute, holders of such matured shares are given a priority over withdrawing shareholders. The statute denies a withdrawing shareholder the right to sue if the funds are applied as above stated.

The foregoing indicates that a radical change has been effected in the rights and privileges of withdrawing shareholders. The prospective effect of the statute is not challenged and rightfully not, but the appellant contends that

if the statute is construed to have a retrospective effect it will affect her rights under P. L. 1925, Chapter 65, Sec. 52, p. 212, which rights have vested, and such impairment of these rights is prohibited by Article 1, Section 10, of the Constitution of the United States, and the XIV Amendment, Section 1 thereof, and Article IV Section 7, paragraph 3, of the Constitution of the State of New Jersey.

In a case involving a somewhat similar statute, Triegle v. Acme Homestead Asso. 297 U. S. 189, 197; 80 L. Ed. 575; 56 Sup. Ct. Rep. 408 Mr. Justice Roberts said:

> "Though the obligations of contracts must yield to a proper exercise of the police power, Home Building and Loan Ass. v. Blaisdell, 290 U. S. 398; 78 L. Ed. 415; 54 Sup. Ct. Rep. 531, and vested rights cannot inhibit the proper exercise of police power, Nebbia v. New York 291 U. S. 502 78 L. Ed. 940; 54 Sup. Ct. Rep. 505, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.
>
> "As we have pointed out, the questioned sections deal only with private rights and are adapted to the legitimate end of conserving or equitably administering the assets in the interest of all the members. They deprive withdrawing members of a solvent association of existing contract rights for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprives him of vested property rights without due process of law."

It may very well be that the statute in Louisiana was not passed "for an end which is in fact public", but the situation which faced our legislature in 1932, if allowed to run unregulated to its apparent and ultimate economic conclusion, would have affected adversely every person in this State.

It is a matter of common knowledge that a large percentage of all persons in this State over the age of twenty-one are members of building and loan associations and that as-

sets and holdings of building and loan associations approximate, if they do not exceed one billion dollars ($1,000,000,000).

This court must judicially notice the fact that investments of building and loan associations are regulated by statute and confined to classes of investment which are also by statute legal investments for banks, trust companies, insurance companies and trustees, particularly first mortgages on real estate located in New Jersey. The court also judicially notices the fact that the associations have foreclosed thousands of these mortgages and bought in the property at the public sale, and that the value of these mortgages runs into hundreds of millions of dollars. The Court also judicially notices the enactment by the Congress of the United States of the Home Owners Loan Act on June 13, 1933, Chap. 64, Art. 1, 48 Stat. 128, Title 12, Sec. 1463, U. S. C. A. and it is also common knowledge that thousands of mortgagors who were in default to the associations availed themselves of the benefit of this statute.

When the legislature in 1903 gave to withdrawing shareholders the unqualified privilege of suit it did not foresee the economic collapse through which this country has labored for the last eight years, with the consequent credit stringency, loss of employment, and collapse of price levels. It is unnecessary to cite official satatistics to establish what is common knowledge throughout the length and breadth of the land. West Coast Hotel Company v. Parrish, — U. S. —; 81 L. Ed. 455, 463. In the face of this financial stringency the number of withdrawals filed by shareholders of associations accelerated at a very rapid rate. It cannot be assumed that they were an exception to what was generally happening in all savings institutions.

The liabilities of building and loan associations to other than shareholders ordinarily amounts to but a negligible percentage of its assets, Cf. Feist v. Guarantee Building & Loan Asso., 118 N. J. L. 144. Hence under the economic conditions existing in 1932, by exercising the unfettered privilege of withdrawal and the concomitant right of suit a rapidly increasing number of withdrawing shareholders created a condition of potential insolvency in all the building and loan associations of this State.

If the right of withdrawal was not regulated and all notices of withdrawals were reduced to judgment, these judgment liabilities, coupled with the fact that by foreclosing mortgages the building and loan associations had acquired title to thousands of unsalable properties in this State, the inevitable result would have been that most of the building and loan associations would eventually become insolvent under Section 65 of the Corporation Act, if we are to consider insolvency to consist of their inability to pay the rapidly gathering withdrawal demands without thereby impairing the assets available to others with like rights.

The legislatures of 1903 and 1925 were neither omniscient or prescient and events proved to the legislature of 1932 that the unfettered privilege of suit granted to withdrawing members compelled these associations to accede to the prior demands of those who made an early request for withdrawals which would completely undo the major purposes for which they were created. The 1932 legislature faced the unenviable choice of permitting conditions to continue as they were with the inevitable result being the actual insolvency of most, if not all, of the associations, or it could regulate the rights of a withdrawing shareholder in a manner consonant with mutuality. It chose the latter and enacted the statute in question, P. L. 1932, Chap. 102.

The actual insolvency of these mutual corporations would have been fraught with a grave public danger. Our insolvency statute, Sec. 65 of the Corporation Act is essentially bankrupt in character, Block vs. Bell Furniture Co. 111 N. J. Eq. 551, 561, and the object of the proceedings under the act is to distribute the estate of the debtor corporation, Stockton v. Mechanics and Laborers Savings Bank, 32 N. J. Eq. 163, 168, 169, and the matured creditors have right to payment at once, Usher vs. Sarco Co. &c. 100 N. J. Eq. 428, 431. Building and Loan Associations are subject to the provisions of the Corporation Act, Sec. 4, by the Building and Loan Act of 1903, as amended and revised, 1 Cum. Supp. to C. S. p. 223; Supp. to C. S. p. 135; P. L. 1932, p. 171. If any great number of them became insolvent, ruinous liquidation necessarily would follow because withdrawing members would be entitled to be paid at once out of the assets of such insolvent associations.

Mere contemplation of such a situation forces the conclusion that there was a tremendous and grave public interest involved. As long as the privilege of suit was unabridged potential insolvency was present as to many and actual insolvency of most necessarily would follow as a matter of course.

The liquidation of the assets of these associations having a value of approximately one billion dollars would have destroyed the stability of and the market for first mortgages on real estate and other types of investments that are prescribed as legal investments by statute for banks, trust companies, insurance companies and other institutions and fiduciaries and to which classes of legal investments the funds of building and loan associations are restricted by law.

The value of real property and real estate mortgages was largely gone for the time being and liquidation could only be had on ruinous terms, but these values were susceptible of ultimate return. The result would be chaos and even under orderly liquidation of this vast amount of assets the ultimate return of these values would be indefinitely postponed if not irreparably impaired. The State has an important interest in the maintenance of real estate values because these values form the major base upon which its tax structure and its various political subdivisions rests. The stability of the tax base over a term of years is vitally important to the State.

The structure of the tax base and the widespread membership in building and loan associations and the fact that the value of the real estate mortgages and real property owned by such associations represents a high percentage of the total value of all taxable real estate in the State, creates a situation which is peculiar to this State. It does not appear from the record or briefs in Treigle v. Acme Homestead Asso. supra, that a comparable situation exists in Louisiana.

Assuming that the appellant has a vested right of contract, the obligations on contract must yield to a proper exercise of the police power of the State and vested rights cannot inhibit the proper exercise of the power, Home Building and Loan Asso. v. Blaisdell, supra. In Nebbia v. New York, supra, at p. 523, Mr. Justice Roberts said:

"Under our form of government the use of property and the making of contracts are normally matters of private concern. The general rule is that both shall be free from governmental interference. But neither property rights or contract rights are absolute; for government cannot exist if the citizen may at his will, use his property right to the detriment of his fellows or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it."

This should be equally true of a contract right which derives its vitality from a statute regulating a business affected with a public interest. This State has strictly regulated building and loan associations under a well defined public policy and the State has a right so to do. Hopkins Federal Savings and Loan Asso. v. Cleary, 296 U. S. 315, 80 L. Ed. 251, 56 Sup. Ct. Rep. 235. The privilege of suit was granted to withdrawing members by the regulatory statutes of this State and it must be assumed that the legislature intended in granting the privilege of suit to withdrawing members that such a grant would be effective in carrying out the public interest affected upon which the regulation of the building and loan associations was predicated.

Experience has demonstrated that adverse economic conditions give the privilege of suit by a withdrawing member a legal force under our insolvency statutes which is absolutely destructive since the unrestricted exercise of the privilege of suit by such members was a motivating and inexorable force that eventually would have forced these associations into insolvency, forced the liquidation of their assets, with the resultant adverse effect upon vital public interests heretofore pointed out.

If such a situation had resulted from the acts of a group of citizens or corporations in the use of their property or their right of contract, can it be questioned that the legislature under the police power could disturb their vested rights of contract by a regulatory statute? That right asserted by the appellant was granted by the legislature under a statutory enactment of previous legislatures, pursuant to the police power of the State, gives the right to no greater

sanctity. The fact is that unlimited use of the right is destructive of vital public interests.

The constitutional prohibition against the impairment of the obligation of contracts does not make it impossible for the State, in the exercise of its essential reserved power to protect the vital interests of all its people. The exercise of that reserved power has been repeatedly sustained against a literalism of the contract clause which would make it destructive of the public interests by depriving the State of its prerogative of self-protection. W. B. Worthen *v.* Thomas, 292 U. S. 426, 433; 78 L. Ed. 1344, 1347, 54 Sup. Ct. Rep. 816.

Nothing that has been said here should conflict with the holdings in Vanderbilt *v.* Brunton Piano Co., 111 N. J. L. 596, and Home Building and Loan Assn. *v.* Blaisdell supra. The subject matter of the contracts in those cases was not per se affected with a public interest. The statutes there in question had effect only upon the interests of the respective contracting parties since the contracts affected thereby were of themselves only capable of a legal or economic force which was coterminous with the limits of the contract.

The contract of the appellant, obviously, is not in this classification. The contract was congenitally affected with a public interest and the contract carries with it the infirmity of the subject matter. Rights which are subject to state restriction cannot be removed from the power of the State, Union Dry Goods Co. *v.* Georgia Public Service Corp. 248 U. S. 372, 63 L. Ed. 309; 39 Sup. Ct. Rep. 117, by the contract of the parties, nor can one legislature inhibit this power of the State to regulate or abridge the use of such contract rights when such use is destructive of vital public interests. P. L. 1932, Chap. 102, p. 175, was enacted "for an end that was in fact public"—to prevent the actual insolvency of the building and loan associations and the resultant and disastrous effects of the liquidation of most of them upon the value of all real property in the State, and the savings of a large proportion of the citizens of the State. The abridgement of the use of the privilege of suit of withdrawing members was reasonably adapted to the accomplishment of that purpose. The only alternative was to permit the withdrawing members to sue and proceed to judg-

ment under their statutory privilege, and that they would have done so, in sufficient numbers and amounts, to force most of the associations into insolvency is a situation that this court will judicially notice. The lack of confidence by the public in savings institutions of all kinds during that period permeated every section of this State and the country as a whole. It is likewise true in any period of economic depression. Without such abridgement of the privilege of suit of withdrawing members all other steps might have been inefficacious to meet the threat to vital public interests under similar economic conditions. Whether the situation created in the building and loan associations in this State by the economic depression is a temporary situation which will abate until the next economic depression is a question this court, at this time must frankly confess it cannot answer.

For these reasons it is concluded that P. L. 1932 Chap. 102 p. 175, is a valid exercise of the police power of the State for an end that is in fact public. The means adopted are reasonably adapted to the accomplishment of that end and are not arbitrary or oppressive but consonant with a vital public need, the purpose of the regulation of building and loan associations of this State, and the protection and conservation of their assets and the investments of the public therein.

The appellant argues that the statute also provides for a preference to holders of matured shares over withdrawing shareholders. The statute gives a priority to a matured shareholder but it only recognizes a preference which the matured shareholder had as a creditor. This court held in Cunningham *v.* Mutual B. & L. Asso., 72 N. J. L. 175, 180, that when the maturity of shares has been declared in the manner prescribed by the scheme of the constitution of the association, and that it had been recognized by the association by its officers that thereafter a holder of the matured shares became a creditor of the association, entitled to receive the money, provided the funds arising from the appropriation of one-half the receipts of the association should be sufficient for such payment.

The statute works no apparent change in the status of a matured shareholder and the preference necessarily only

applies to shareholders whose shares have been matured in the prescribed manner and who have filed the statutory notice prior to the notice of withdrawal. It leaves the status of the parties unchanged.

This results in the conclusion that the appellant's complaint did not state a cause of action and we are not concerned with the objections lodged against P. L. 1933, Chap. 48, 166 and 258.

The judgment under review is affirmed with costs.

Endorsed: "Filed Oct. 26, 1937. Thomas A. Mathis, Clerk."

EXHIBIT C

NEW JERSEY COURT OF ERRORS AND APPEALS.

Nos. 139, 143. October 26, 1937. 194 Atl. 865.

IDA ROCKER, Appellant,

vs.

CARDINAL BUILDING & LOAN ASSOCIATION OF THE CITY OF NEWARK, Appellee.

Appeal from Supreme Court.

John J. Stamler, for appellant.

Harold Simandl of Newark and John Warren of Jersey City, (Louis J. Cohen, Asst. Atty. Gen. of Counsel), for respondent.

PER CURIAM.

These appeals are in all respects identical with that of Busci *v.* Longworth Building and Loan Association (N. J. Err. & App.), 194 A. 857, decided October 26, 1937 except that in the former the action was to recover the withdrawal value of installment shares, and in the latter the principal and interest of paid-up shares. This is of no consequence. P. L. 1925 c. 65, Sec. 74, pp. 223, 224. (Comp. St. Supp. 1930, Sec. 27-R (74), under the title of "Status of shares," provides inter alia "and all members shall occupy the same relative status as to debts and losses of such association"

and "no agreement or understanding shall be made or entered into whereby the time for surrendering paidup shares to such association and withdrawing the value thereof shall be postponed, and paid up shares shall only be surrendered and withdrawn on the same terms and under the same conditions as provided in the constitution for the surrender and withdrawal of installment shares."

The judgment under review will be affirmed, with costs.

(Filed Nov. 3, 1939.)

(5009)

FILE COPY

DEC 6 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

WALTER P. REILLY,
JAMES L. HANDFORD,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
New Jersey Court of Errors and Appeals, opinions, where officially reported	1
Facts	1
Argument	2
Point I—The New Jersey Court of Errors and Appeals in fact did not consider the 1937 Revised Statutes of New Jersey 17: 12-53 and decided said statutes to be constitutional	2
A. History of The New Jersey Legislation	3
B. In interpreting the meaning of the highest Court of a State, this Court looks not only to the opinion itself, but also to the entire record	7
Point II—The case at bar involves definite contract obligations and rights of property	9
A. The appellant has a vested contract right which cannot be impaired by subsequent legislation	13
Point III—The police power does not save the legislation from unconstitutionality	17
Conclusion	21
Appendix	24
By-Laws	24

Table of Cases and Other Citations.

Bedford v. *Eastern Building & Loan Assn.*, 181 U. S. 227	11
Bronson v. *Kinzie*, 1 Howard 311	20
Bucsi v. *Longworth Building & Loan Association*, 119 N. J. L. 120, 194 Atl. 857	2, 5, 10, 18
Braunstein v. *Jersey City*, 98 N. J. L. 479	19
Coombes v. *Getz*, 285 U. S. 434	13
Constitution of United States:	
Section 10, Article 1	8
Section 1, Amendment XIV	8
Ettor v. *Tacoma*, 228 U. S. 148	13

Page

French v. *Wolfson*, 88 N. J. L. 669 10
Fornataro v. *Atlantic Coast Building & Loan Association*, 10 N. J. Misc. 1248, 163 Atl. 240 11
Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398 20
McCullough v. *Virginia*, 172 U. S. 102, 116, 117 7
McDonald v. *Hovey*, 110 U. S. 619 6
New York ex rel Bryant v. *Zimmerman et al.*, 278 U. S. 63, 67 ..... 7, 9
Pacific Mail S. S. Co. v. *Joliffe*, 69 U. S. 450 ..... 13, 16
Rocker v. *Cardinal Building & Loan Ass'n*, 13 N. J. Misc. 411, 179 Atl. 667, Aff. 119 N. J. L. 134, 194 Atl. 865 ..... 2, 12
St. Louis, Iron Mountain & Southern Railway Company v. *Starbird, Adm. of Miller*, 243 U. S. 593, 599. 7
Treigle v. *Acme Homestead Association*, 181 La. 940, 160 So. 637 ..... 11, 19
Treigle v. *Acme Homestead Association*, 297 U. S. 189 ..... 11, 17
Williams v. *Bruffey*, 102 U. S. 248 7

Revised Statutes of New Jersey of 1937:

R. S. 17: 12-53 ..... 2, 3, 6, 8, 20
R. S. 1: 2-3 6
R. S. 1: 1-4 7
R. S. 1: 1-5 7
R. S. 1: 1-5.1 3
Sixth Ward Building and Loan Association of Newark, N. J. 24

Legislative Act of New Jersey:

P. L. 1925, Chapter 65, pp. 211, 212 and 213 ..... 2, 13
Section 49 24
Section 52 ..... 4, 24
P. L. 1932, Chapter 102, pp. 175, 176 25
Section 52 25
P. L. 1935, Chapter 59, pp. 153, 154, 155 26
Section 52 ..... 5, 26
P. L. 1936, Chapter 118, pp. 295, 296, 297 28
Section 52 ..... 5, 28
P. L. 1937, Chapter 188, p. 832 ..... 3, 30

Page

Revised Statutes of New Jersey of 1937:
Title 17: Chapter 12, Par. 53 ..... 2, 3, 7, 8, 9, 10, 31

Revised Statutes of New Jersey of 1937:
Title 1: Chapter 1, Par. 4 32

Revised Statutes of New Jersey of 1937:
Title 1: Chapter 1, Par. 5 33

Revised Statutes of New Jersey of 1937:
Title 1: Chapter 1, Par. 5.1 ..... 3, 33

OPINION OF THE NEW JERSEY COURT OF ERRORS AND APPEALS WHERE OFFICIALLY REPORTED.

Title:

Veix v. *Sixth Ward Building and Loan Association of Newark, N. J.* 1

Official Report:
123 New Jersey Law Report, p. 356 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

vs. *Appellant,*

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

The appellant respectfully presents this brief under Rule 7, paragraph 3, in opposition to appellee's motion to dismiss for w.. t of jurisdiction.

Facts

The facts are stated in the appellant's statement of jurisdiction (p. 5, et seq.); the original complaint is set forth in full in the appellee's motion to dismiss (p. 6, etc.) and the original answer is set forth in full in appellee's motion to dismiss (p. 11).

The opinion of the New Jersey Court of Errors and Appeals is set forth in full as Exhibit A appended to our statement of jurisdiction (p. 15); the opinion of the New Jersey Court of Errors and Appeals in the case of *Bucsi* v. *Longworth Building and Loan Association*, 119 N. J. L. 120, 194 Atl. 857, is set forth in full as Exhibit B appended to our statement of jurisdiction (p. 16) and the opinion of the New Jersey Court of Errors and Appeals in the case of *Rocker* v. *Cardinal B. & L. Association*, 119 N. J. L. 134-194 Atl. 865, is set forth in full as Exhibit C appended to the statement of jurisdiction (p. 30).

The statutes involved are set forth in full in the appendix to this brief.

ARGUMENT

Point 1

The New Jersey Court of Errors and Appeals in fact did consider the 1937 revised statutes of New Jersey 17: 12-53, and decided said statute to be constitutional.

The third paragraph of the per curiam opinion of the New Jersey Court of Errors and Appeals in this cause, filed September 22, 1939 (p. 15, Jurisdictional Statement), is as follows:

> "Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17: 12-2, et seq. At that time the 1925 statute, *supra*, provided, *inter alia*, that the owner of such stock might have same redeemed for cash by giving a thirty day notice in writing and that such withdrawal should be paid by the association in the order in which notice had been received. On August 17, 1932, the plaintiff gave the defendant such written notice of withdrawal, and after the lapse of thirty days, demanded payment. But prior thereto the Legislature had amended the 1925 Statute by Chapter 102, P. L. 1932; R. S. 17: 12-53."
>
> (Now officially reported in 123 N. J. L. 356.)

The 1937 Revised Statutes of New Jersey, Title 1, Chapter 1, paragraph 5.1, is as follows:

> "1:1-5-1. *Citation of, pleading or otherwise referring to legislation contained in Revised Statutes.*—The legislation contained within any title, sub-title, part, chapter, article, section or group of sections of these Revised Statutes may be cited, pleaded or otherwise referred to by reference to such title, subtitle, part, chapter, article, section or group of sections of the "Revised Statutes," containing such legislation; and the use of the words "Revised Statutes" shall have the same effect as if the legislative title under which these Revised Statutes were adopted and the approval date thereof had been used.
>
> 'In any citation the abbreviation "R. S." shall be equivalent to "Revised Statutes", and sections of these Revised Statutes may be cited by section number only preceded by such abbreviation."

It is very evident that the New Jersey Court of Errors and Appeals had in mind the 1937 Revision, Title 17: Chapter 12, par. 53, when it made the statement in its opinion above quoted. In the next paragraph of its opinion where the court referred to the 1932 Statute, it had in mind the 1932 Statute, as amended, and as carried into the 1937 Revision. In fact, when the 1937 Revision was adopted, that superseded all of the prior legislation covered by the Revision. Therefore, at the time this case at bar was instituted, March 24, 1939, and likewise when it came before the New Jersey Court of Errors and Appeals, May 5, 1939, the 1937 Revision was the only existing statute on the subject, all of the prior statutes having been superseded by the 1937 Revision.

1937 Laws of New Jersey, Chapter 188, paragraph 1.

A. History of the New Jersey Legislation.

In order to present the history of this legislation clearly, we set out the various changes since Chapter 65 of the

Pamphlet Laws of New Jersey of 1925, was enacted. The 1925 Statute is set out in full in the Statement of Jurisdiction (R. 33) and in the appendix to this brief.

Section 52 of the 1925 Statute provided, among other things as follows:

> "* * * ; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

We especially point out that the Statute uses the words "*sue for and recover*". This completely disposes of appellee's argument that the legislature intended but an empty suit (R. 80, 81 and 82).

On April 22, 1932 the New Jersey Legislature amended Section 52 of the 1925 Act, to read as set forth in full in appellee's motion (P. 3-5), and in the appendix to this brief, the latter part of which provides:

> "A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein."

The important distinction between this and the 1925 Act is that it omits the provision of the 1925 Act which gave the right to a withdrawing member to institute suit and to recover the withdrawal value of his shares, if same were not paid in six months from the date of giving his withdrawal notice, and substituted therefor a withdrawal list, from which the withdrawing members were entitled to re-

ceive $500.00 in rotation each month, if funds were available for that purpose and if all matured shares are first paid in full. *It also contains a provision that no member shall have the right to bring suit against the association so long as the funds of the association are applied as required by this section.*

This was the act that was in effect when the New Jersey Court of Errors and Appeals decided the case of *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120; 194 A. 857.

But, on March 12, 1935 the New Jersey Legislature again amended Section 52 of the 1925 Act, by Chapter 59 of the Laws of 1935 set forth in the appendix to this brief. This statute is in different form, but in effect is the same as the 1932 Act except that it authorizes the payment of $50.00 in rotation to each member on the withdrawal list instead of $500.00 and goes into detail regarding the amount of funds which the directors may allocate for the payment of withdrawals and maturities. *The 1935 Act also contains the provision that no member shall have the right to bring suit against the association so long as the funds of the association are applied as required by this section.* We do not set out this act because it was superseded by the 1936 Act following.

Again the Legislature of New Jersey on May 26, 1936 amended Section 52 of the 1925 Act by Chapter 118 of the Laws of 1936 set forth in the appendix to this brief, making minor changes to clarify the position of withdrawing members on the withdrawal list. *This statute likewise did away with the right of the shareholder to sue for and recover the withdrawal value of his shares if the same be not paid within six months from the date of withdrawal notice, and specifically provided that no member should have the right to bring suit so long as the funds of the association should*

be applied as required by that section. We do not set forth this act because it was carried into the 1937 Revision, as 17: 12-53. The 1937 Revision was enacted on December 20, 1937 (not 1927 as stated by appellee) and became effective July 4, 1938 (R. S. 1: 2-3). In the 1937 Revision, section 52 of the 1925 Act as amended by Chapter 118 of the Laws of 1936 was carried verbatim (except for three very minor changes in paragraph "f" thereof) as title 17: Chapter 12, paragraph 53. This is set forth in full in the Statement of Jurisdiction (R. 31-32) and in the appendix to this brief. Therefore, Section 17: 12-53 was not an original enactment as stated by the appellee in its motion to dismiss. In fact, the objectionable provision had been in existence since 1932, namely; depriving of the withdrawing shareholders of the right to bring suit and recover the value of the shares, after his withdrawal notice had been on file for six months. Furthermore the identical statute was in effect prior to the revision, namely since the enactment of Chapter 118 of the Laws of 1936.

There is no marked difference in substance so far as this appeal is concerned, between the acts of 1932-1935, 1936 and 1937 Revision, and they are all repugnant to the Federal Constitution.

The Supreme Court of the United States has declared the rule to be that upon a revision of Statutes the mere change of phraseology will not be construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change.

McDonald v. *Hovey*, 110 U. S. 619, 629.

When the *Bucsi* case was instituted and when it came before the New Jersey Court of Errors and Appeals the objectionable provisions were contained in the 1932 Statute, but when the case at bar was instituted and came before the New Jersey Court of Errors and Appeals, the same objec-

tionable provision had been carried forward, through the various amendments into the 1937 Revision. The 1937 Revision was the only Statute in New Jersey on this subject when the case at bar was instituted, and when it came before the New Jersey Court of Errors and Appeals for decision.

The Legislature of New Jersey in 1937 had expressly said that the Revised Statutes, except in the sole case of inconsistency, shall be construed as a continuation of prior laws. "R. S. 1:1-4" which provides as follows:

> "The provisions of the Revised Statutes not inconsistent with those of prior laws, shall be construed as a continuation of such laws."

R. S. 1; 1-5 provides the following:

> "The classification and arrangement of the several sections of the revised statutes have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom."

B. In Interpreting the Meaning of the Opinion of the Highest Court of a State, this Court Looks Not Only to the Opinion Itself, But Also to the Entire Record.

New York ex rel. Bryant v. *Zimmerman et al.*, 278 U. S. 63: 67.

St. Louis Iron Mountain & Southern Railway Company v. *Starbird, Admr. of Miller*, 243 U. S. 593; 599.

McCullough v. *Virginia*, 172 U. S. 102, 116, 117.

Williams v. *Bruffy*, 102 U. S. 248.

The appellant's original complaint is set forth in full in appellee's motion to dismiss (P. 6). Likewise the appellee's answer thereto (P. 11). In paragraph 11 of his original complaint (P. 8-9) appellant refers to 17-12-53 of the 1937 Revision as being in violation of the Federal Consti-

tution; the appellee in his answer filed in this cause at page 12 of the motion to dismiss specifically refers to 1937 Revised Statutes 17: 12-53 and quotes that portion of it which prohibits a suit by a withdrawing shareholder so long as the association complies with that section. In fact R. S. 17: 12-53 is the very defense set up by the appellee in its original answer to the original complaint (P. 12, motion to dismiss).

The appellant's Grounds of Appeal to the New Jersey Court of Errors and Appeals specifically sets forth R. S. 17: 12-53 and alleges that Statute to be unconstitutional within the inhibitions of Article 1 Section 10 of the Constitution of the United States of America, and Section 1 of the 14th Amendment of the Constitution of the United States of America. (P. 11, Jurisdictional Statement.)

The appellant in his brief filed in the New Jersey Court of Errors and Appeals in this cause, sets forth in full 1937 Revised Statutes 17: 12-53, the appellee in its brief filed in that appeal specifically refers to the 1937 Revision 17: 12-53 and the New Jersey Court of Errors and Appeals specifically refers in its opinion to Revised Statutes 17: 12-53 (P. 14-15, Jurisdictional Statement). The New Jersey Court of Errors and Appeals also refers to Chapter 102 of the Laws of 1932 but clearly this must be read in connection with its prior paragraph where it also refers to R. S. 17: 12-53. In fact they are synonymous, in that both of them deprive the appellant of his right given by the 1925 statute to institute suit to recover the withdrawal value of his shares if the same is not paid within six months of the date of giving the withdrawal notice. There is no marked difference in substance between the 1932 Act and the corresponding section of the 1937 Revision.

The New Jersey Court of Errors and Appeals well knew that the 1932 Statute, as such, had been superseded by the subsequent legislation as finally adopted in the Revision of

1937. It well knew that it was R. S. 17: 12-53 that was before it in the case at bar. It is quite evident that that Honorable Court intended to pass upon the 1932 Statute as subsequently amended by the 1935 and 1936 Acts, and as carried into the 1937 Revision as R. S. 17: 12-53.

In *New York Ex. Rel. Bryant* v. *Zimmerman et al. supra*, Mr. Justice Van Devanter on page 67, said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the State Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

We desire to make it clear that appellant's charges of unconstitutionality are directed at the legislation in question only as it affects appellant; and we do not suggest that the statute is invalid prospectively. Appellant insists only as retroactively applied to appellant, who bought and paid in full for his shares prior to the enactment of the offending provisions, such legislation is invalid, unjust, discriminatory, arbitrary, unreasonable and unconstitutional. We are not concerned with the contracts of those members who subscribed for their shares after the enactment of the offending provisions.

Point II.

The case at bar involves definite contract obligations and rights of property.

The New Jersey Court of Errors and Appeals has chosen to rest its decision in this case upon *Bucsi* v. *Longworth*

Building and Loan Association, 119 N. J. L. 120. That case rested squarely upon the proposition that the statute there in question (Chapter 102 of the Laws of 1932, now R. S. 17: 12-53) deprived the appellant of valuable contract and property rights, which he had enjoyed prior to its enactment, but justified the subsequent statute as a proper exercise of the police power of the State.

The New Jersey Court of Errors and Appeals, moreover, in 1913 declared the rights of a withdrawing shareholder under a prior statute which was similar to the 1925 statute by asserting that the right to sue or set off the withdrawal value applied only to solvent associations. This was decided in *French* v. *Wolfson*, 88 N. J. L. 669; at page 671 the court said:

> "The argument made is that section 39, among other things, provides that a shareholder who has given notice of withdrawal may sue for and recover the withdrawal value of his shares in any such association, in any court of competent jurisdiction if the same is not paid in six months from the date of the giving of said notice of withdrawal, a provision not contained in the old act, and hence, by reason of this change in the act, Gaskill *v.* Polhemus is not applicable to the case sub judice: But we think otherwise. *No doubt that this change gave the withdrawing stockholder a right to sue for the book value of his shares at the expiration of six months from the time of giving notice of his withdrawal.* This clearly negatives any right to sue in advance of the expiration of the six months and as a set off is, in effect a counter suit, no such set off could be permitted until the six months had expired. Now, though the six months have expired, the situation has changed and the dissolution of the association has begun. We think the rights of the parties must be determined as of the time when the stockholders resolved on dissolution, since the statute contemplates that the withdrawals shall be withdrawals from a live concern and not from a defunct one. (Italics ours.)

The case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, like the case at bar, deals with a solvent association.

In the case of *Bedford* v. *Eastern Building and Loan Association*, 181 U. S. 227, 240, this Honorable Court in holding that the subscription to building and loan shares constitutes a contract with the association said:

> "* * * By his subscription to stock of the association Bedford became a member of the association—bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract."

The courts of New Jersey have held that the offending provisions in the New Jersey Statute are quite similar to the Louisiana Statutes that were under consideration in the Treigle case, and adopt the logic of the Louisiana Supreme Court.

In *Fornataro* v. *Atlantic Coast Building and Loan Association*, 10 N. J. Misc. 1248, 163 A. 240, the Supreme Court of New Jersey sustained Chapter 102 P. L. 1932, as constitutional upon the grounds that the act purports to deal with an existing emergency.

The *Farnataro* case, *supra*, was adopted in *Treigle* v. *Acme Homestead Association*, 181 Louisiana 941 (160 Southern 637), wherein Chief Justice O'Neill said (page 644):

> "Our attention is called to similar statutes which have been enacted in many other states during the last few years of the financial depression; and we are not aware of any instance where provisions such as are questioned in this case have been declared unconstitutional by a court of last resort. In Fornataro and

Romano *v.* Atlantic Coast Building and Loan Association, 16[illegible] A. 240, 10 N. J. Misc. 1248, the plaintiffs being withdrawing shareholders in the association contended that a statute of 1932 (Chapter 102 P. L. 1932, p. 175) (N. J. St. Annual 1932, Sec. 27-R 52) similar to the Louisiana Statute of 1932 could not deprive them of their rights acquired under a previous statute (Chapter 65 P. L. 1925 52, p. 212, Comp. St. Supp. 1930, 27-R. 52) without violating the obligations of the contract between them and the association. The Supreme Court of New Jersey ruled against the plaintiffs' contention * * *."

In the case of *Rocker* v. *Cardinal Building & Loan Association*, 13 N. J. Misc. 411, 179 A. 667, affirmed by the Court of Errors and Appeals, 119 N. J. L. 134, 194 A. 865; the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals adopted the opinion in the Louisiana *Treigle* case. Judge Cleary said:

"* * * Treigle *v.* Acme Homestead Ass'n (Louisiana Supreme Court, decided March 4, 1935). This case deals with facts and statutes quite similar to those under consideration in the case at bar. The logic of that decision is apparent, is applicable to the present situation, and is adopted by this Court. See, also Building and Loan Annals, 1932 pages 299, 307, for the first and excellent rules of law enunciated in the Fornataro and Treigle cases and upon which this decision is based."

We now have a situation where Louisiana Supreme Court first adopts the view as expressed in the *Fornataro* case, and in a decision by the New Jersey Supreme Court in *Rocker* v. *Cardinal Building and Loan Association (supra)*, affirmed by the New Jersey Court of Errors and Appeals, the Court adopts the logic of the opinion in the Louisiana *Treigle* case, which was reversed by the Supreme Court of

the United States, 297 U. S. 189. Quoting Mr. Justice Roberts, pages 194-196:

> "The Statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Articles 1, Sec. 10 and Amendment 14, Section 1, of the Constitution. * * * The Statute merely attempts for no discernible public purpose, the abrogation of contracts between members and the association lawful when made."

The legislation here attacked deprives the appellant of a contractual vested right, and is therefore unconstitutional.

A. The Appellant has a Vested Contract Right Which Cannot be Impaired by Subsequent Legislation.

The appellee tries to distinguish the New Jersey Statute by stating that our 1925 Statute affords a "statutory privilege" and not an obligation of contract. It attempts to sustain that theory by a lengthy discourse on "legislative history" and "legislative philosophy."

But such a theory has been long since exploded by this Honorable Court.

It is not a mere legislative gratuity or privilege that is conferred by P. L. 1925, Chapter 65, Sections 49 and 52. We are dealing with a contractual relation existing between the corporation and a member, the law existing at the time of the contract being an integral part of it.

Appellant, upon paying his money to the association and accepting its prepaid shares under the 1925 Statute then in force became vested with a valid contract and a valuable property right. It did not arise upon the constitutional rule of law, but upon the contractual liability created under and in pursuance of the Statute then in force.

Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866;
Ettor v. *Tacoma*, 228 U. S. 148, 156, 57 Ed. 773;
Pacific Mail S. S. Co. v. *Joliffe*, 69 U. S. 450 (2 Wall.).

In case of *Ettor* v. *Tacoma, supra*, the State of Washington had by statute imposed a liability on municipal corporations in favor of property owners sustaining consequential damages to their property as a result of street paving operations. While the statute was in force, suit was brought to recover damages inflicted upon an abutting property in consequence of street grading, done by direction of the City of Tacoma. While the suit was being heard, the statute creating the liability was repealed, and the trial court directed a verdict in favor of the City, on the theory that the right of action was statutory, and fell with the statute, there being no saving clause. This judgment was affirmed by the State Supreme Court; it was reversed, the Court saying:

> "The necessary effect of the repealing Act, as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the City to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—and a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In the case of *Coombes* v. *Getz, supra*, there was presented a controversy wherein a creditor had brought suit against a director of a corporation, claiming liability by the director for a bill of goods which the creditor had sold to the corporation on open account. At the time the bill of goods was sold, there was a constitutional provision in force in the State of California, which made directors of corpora-

tions liable in the event of failure to pay corporate indebtedness by virtue of embezzlement of corporate funds. In this case, the Supreme Court of California held, that the director was not liable, because the constitutional provision creating the liability had been repealed, before the suit of the creditor against the director was reduced to judgment. The Supreme Court of the United States held, however, that the directors, in taking their oath of office, impliedly accepted the obligations imposed by the constitutional provision of the California Constitution; and since the merchandise had been sold to the corporation while this rule of law was in full force and effect, a contract right in the provisions of law was created, which it was incompetent for the State to repeal, and thus to impair the obligation of the creditor's contract.

In each of the two cases just cited, it was contended that the obligation claimed to have been impaired by the subsequent legislation was an obligation imposed by statute merely and subject to legislative repeal, and was not a contractual obligation.

Mr. Justice Sutherland in *Coombes* v. *Getz, supra,* thus disposes of this contention, at page 442.

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor, which in every sense was a property right."

The Court in *Pacific Mail S. S. Co.* v. *Joliffe*, 69 U. S. 450 (2 Wall) expressed the same thought in these words, at page 457:

> "The claim of the plaintiff below for half-pilotage fee, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him, his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

Indeed, the fallacious theory advanced by the appellee was raised in the *Treigle* case almost from its inception. An inspection of the record in that case, on file in the library of this Honorable Court discloses that Judge Gleason, in his opinion at page 19 of the Treigle transcript adverts to the "purely statutory" theory advanced by the defendants, and discards it. In the brief of the appellee filed in this Court in the *Treigle* case (page 32) the heading is found as follows "A shareholder's right of withdrawal in a building and loan association is purely statutory, is always within the control of the Legislature and may be altered by the legislature in its discretion. It has none of the characteristics of a conventional agreement, or a vested right."

Again, in the brief Amicae Curiae, in behalf of the U. S. Building and Loan League in the *Treigle* cases filed in this Honorable Court, the greater part of that brief is written in an attempt to sustain their fallacious argument that the appellant's rights are not contractual but purely statutory

and can be changed or altered at the will of the Legislature.

Again, in the petition for rehearing filed by John Warren, in the *Treigle* case in this Honorable Court, in behalf of the Banking Departments of the States of Indiana, Illinois, Wisconsin and Texas, he argues that the Louisiana statute accords but a privilege to the withdrawing shareholder and not a contractual or vested right.

Thus it appears that this matter of "statutory privilege" as distinguished from a contractual and vested right was fully presented to this Honorable Court in the *Treigle* case and we respectfully submit that the decision in that case 297 U. S. 189 lays that fallacious notion to rest for all time in the following words at page 194:

> "The statute impairs the obligation of appellants' contract and destroys his vested rights in contravention of Article 1, #10 and Amendment 14 #1 and the Constitution."

Point III

The police power does not save the legislation from unconstitutionality.

We consider this point to have been set at rest for all time in this Honorable Court by its decision in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189—in these words:

> "The Legislature has no greater power to interfere with the private contracts of such corporations, or vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in a case of a private corporation."

The New Jersey Court of Errors and Appeals decided the case of *Bucsi* v. *Longworth Building and Loan Association* (*supra*), after the decision in the *Treigle* case was rendered by this Honorable Court, and in fact in the *Bucsi* case they

mention and quote from the Treigle decision. However, in the *Bucsi* case they say: 119 N. J. Law 120:127.

> "It may very well be that the statute in Louisiana was not passed 'for an end which is in fact public,' but the situation which faced our Legislature in 1932, if allowed to run unregulated to its apparent and ultimate economic conclusion, would have affected adversely every person in this state."

The Court then proceeds to recite the economic conditions as they are alleged to have existed in New Jersey in 1932 and proceeds as follows at page 130.

> "The structure of the tax base and the widespread membership in building and loan Associations, and the fact that the value of the real estate mortgages and real property owned by such associations represent a high percentage of the total value of all taxable real estate in the state, creates a situation which is peculiar to this state. It does not appear from the record of briefs in the *Treigle* v. *Acme Homestead Ass'n. supra* that a comparable situation exists in Louisiana."

It is respectfully submitted, however, that these very questions and proofs were before this Honorable Court when the *Treigle* case was argued. An examination of the record and briefs in the *Treigle* case on file in the Library of this Honorable Court discloses that the original answer filed by the defendant in the court of first instance under paragraph XV (Treigle record page 13, 14, 15, 16 and 17), are concerned exclusively with a recital of the adverse effects of the economic depression in Louisiana upon the building and loans of that state. Judge Gleason, sitting in the Court of first instance nevertheless sums it all up in these words (Treigle record 30).

> "If these provisions are defensible under our constitutional guarantees, one might as well write out of

the constitution these fundamental guarantees of government, and leave to the whims of the respective legislature the destiny of all contractual relations."

The opinion of the Supreme Court of Louisiana in *Treigle* vs. *Acme Homestead Association,* 181 La. 941, treats this situation.

Again the economic situation in Louisiana was discussed at page 13 of the appellee's brief in the *Treigle* case, and in his petition for re-hearing, the appellee lays stress upon the economic effect of the depression upon Building and Loan Associations in Louisiana. (Treigle Record 5 and 8).

An examination of the Treigle record and briefs, therefore discloses that when the New Jersey Court of Errors and Appeals in the *Bucsi* case stated that it does not appear from the records and briefs in *Treigle* v. *Acme Homestead Association, supra,* that a comparable situation exists in Louisiana, that honorable court was in error. In fact, the record and briefs in the *Treigle* case disclose that the identical situation which the New Jersey Court of Errors and Appeals alleged to exist in New Jersey was also alleged by the appellee in the *Treigle* case to exist in Louisiana and was even set forth in detail in the very first pleading filed by the appellee in the *Treigle* case. Furthermore, the New Jersey Court of Errors and Appeals passed upon this very question prior to the *Bucsi* case of *Braunstein* v. *Jersey City,* 98 N. J. L. 479 (page 480).

"* * * The arguments of emergency and 'police power' alluded to in the other case are reiterated here * * * are authority for the validity of the statute under which exemption from tax is now claimed. On this phase of the case it is sufficient to say that the statutes involved in those decisions related in no way to tax exemption, nor to any repugnancy of a state statute to a plain mandate in a state constitution, but to statutes affecting the contract relation of landlord and tenant,

with which we are in no way concerned at this time, and hence we deem them inapplicable and irrelevant to the question before us, which is, whether the Exemption Act of 1920 is plainly in violation of the constitutional provision that property shall be assessed for taxation under general laws and by uniform rules according to its true value, as it manifestly is, can be supported on any theory of 'emergency' or of so called 'police power.' *As to this, we specifically concur in the view expressed by the Supreme Court in the Koch case that a pressing emergency is no ground for violation of a constitutional provision, and that the 'police power' broad as it is, cannot be exercised in defiance of constitutional limitations.'* (Italics ours.)

Finally, upon this phase of the case, we would refer to the long line of decisions in which statutes of this sort, which have sought under the guise of police power to take property rights from, or to impair the contract obligations of one person or class of persons for the benefit of another person or class of persons have repeatedly been held to be unconstitutional.

The Minnesota Moratorium case (*Home Building & Loan Association* vs. *Blaisdell*, 290 U. S. 398) cites and discusses them all, from *Bronson* v. *Kinzie*, 1 Howard 311, on down to the present time; and points out that the protection of one class of persons at the expense of another class may only be justified as emergency legislation if reasonably conditioned. If the legislation is temporary and consideration is allowed for temporary taking of property, the legislation may be constitutional.

The New Jersey Revised Statutes 17: 12-53 is a part of this permanent statutory law of the State and not emergency legislation.

In fact, the New Jersey Court of Errors and Appeals in *Bucci* v. *Longworth Building and Loan Association*

(*supra*) specifically admits that this legislation is out of the class of mere emergency legislation.

It should be pointed out that nowhere in the record in the case at bar is it alleged or even suggested that a situation exists *now* in New Jersey similar to that which was alleged to have existed in New Jersey and in Louisiana in 1935-1936, when the *Bucsi* case was decided. Over three years have elapsed since that decision was rendered.

The silence of the appellee in this regard bespeaks of but two alternatives: (1) Either the appellee concedes that the reasoning in the *Bucsi* case in this regard was unsound when made, or (2) the appellee concedes that the economic situation in New Jersey regarding Building and Loans as alleged in the *Bucsi* decision in 1936 has *now* materially improved, or has *now* completely corrected itself.

Conclusion

It is unfair for the appellee to charge that we desire to wreck the appellee building and loan association (P. 1822 motion to dismiss). We emphatically disavow any such purpose or intention. The appellant invested his money in this building and loan association in 1928 and 1929 and under the statute and by-laws then existing, he had the right to the repayment of his money, with interest, upon giving 30 days written notice to that effect. That is his contract, and he would not have invested his money on any other agreement. The appellant has not "fallen by the wayside" (P. 21—motion to dismiss); he did not agree to continue his investment until all instalment shares had matured and been paid (P. 22—motion to dismiss); he did not breach his contract with the association (P. 22—motion to dismiss); he did not agree to "remain in to the end, bearing his part of all its burdens, and finally sharing all

its profits in the same proportion" (P. 22—motion to dismiss). Appellant is not an instalment shareholder. His contract entitles him to receive his money invested on thirty days notice, with interest at six per centum per annum, no more, and no less. He was in dire need of his money in 1932, and then gave his written notice of withdrawal in accordance with the contract he made; thirty days thereafter he demanded his money and six months thereafter and on many other occasions he demanded it, and although the appellee was at all times solvent and had sufficient funds on hand in cash to pay the same, payment was refused (P. 8-9—motion to dismiss). At no time since 1932 has the appellant been "silent" (P. 25—motion to dismiss). The appellee has constantly refused to honor its honest contractual obligations, unjustly excusing its breach of contract by pointing to the subsequent unconstitutional statutes of New Jersey. The appellee points out that "the operation of the building and loan associations in this State during the latter part of the last century had been so loose and utterly devoid of any consideration of the purpose for which they were created and the rights of the subscribing members that the situation was a public scandal" (P. 16—motion to dismiss). But the appellee fails to mention the "public scandal" as it exists to-day in New Jersey! Many of these solvent associations in New Jersey have been permitted to continue in business, make new loans and operate in the usual way, and, being solvent at the same time have been permitted to dishonor their solemn contracts regarding withdrawals. The appellee has been forced to wait for over 7 years and has not even received his 6% interest! The pressed and needy withdrawing shareholders have been left to the mercy, whims and caprice of the directors, whose power in this regard has been exalted in this State above that of the Federal Constitution.

Appellant disavows any desire or purpose to "wreck" any of these associations. The appellant's charges of unconstitutionality are directed solely at the legislation as it affects the appellant; we do not suggest that the statute is invalid prospectively. We are not concerned with contracts of others who subscribed for shares after the enactment of the offending statutes nor of borrowing shareholders. We insist only as retroactively applied to appellant who bought and paid for his prepaid shares in full prior to the enactment of the offending provisions (and without any right on his part to share in the general profits of the association, but with the express right to receive his principal and six per centum per annum interest on his investment upon giving thirty days notice), the subsequent legislation of 1932, 1935, 1936 and 1937 is, as to him unconstitutional, unjust, discriminatory and a violation of his contract and of his vested rights.

It is respectfully submitted that this Honorable Court has complete jurisdiction, that the appellee's motion to dismiss should be denied and this appeal be allowed to proceed.

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JAMES L. HANDFORD,
Of Counsel with Appellant.

APPENDIX

By-Laws of the Sixth Ward Building and Loan Association of Newark, New Jersey (R. 67)

ARTICLE XIX. Prepaid shares.

Section 2.—Prepaid shares shall bear interest payable semi-annually on the First day of May and November of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any regular meeting of the Association.

Legislative Acts of New Jersey

An Act Concerning Building and Loan Associations (Revision of 1925), N. J. Pamphlet Laws of 1925, Chapter 65, Section 49, and 52 pp. 211, 212, 213.

49. How withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section.

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been re-

ceived, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal.

Chapter 102 of New Jersey Pamphlet Laws of 1932, pp. 175, 176.

Chapter 102.

An Act to amend an act entitled "An Act concerning building and loan associations (Revision of 1925)," approved March twelfth, one thousand nine hundred and twenty-five.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section fifty-two of the act of which this act is amendatory, be and the same is hereby amended so that the same shall read as follows:

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs IV and V of section twenty-six hereof shall be required to be used for the payment of withdrawals, without the consent of the board of directors; provided however that if in any one month the funds of the association required to be available

for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars, shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

2. This act shall take effect immediately.

Approved April 22, 1932.

Chapter 59 of the New Jersey Pamphlet Laws of 1935 (Section 52), pp. 153, 154, 155.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

52. Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein:

(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals

shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts", as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies used for operating expenses, monies used to pay creditor obligations, monies used for conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible pay out of such funds, on account of the sum due on each such withdrawal, in the order in which the notices shall have been filed, the sum of fifty dollars or the balance due thereon, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of each such withdrawal, in said order, the sum of fifty dollars or the balance due thereon, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal next following the one on account of which the last such payment was made; and

(e) No member to whom any such association shall be obligated for the payment of any maturity or withdrawal

shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion, to make available additional funds other than those required in subdivision (c) of this section for the payment of maturities and withdrawals; provided however, that no more than one-third of the net receipts, as defined in sub-division (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 118 New Jersey Pamphlet Laws of 1936 (Section 52) pp. 295, 296, 297.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

52. Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein;

(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies

used for operating expenses, monies used to pay creditor obligations, monies used for the conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawing obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

(e) No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion to make available addi-

tional funds other than those required in subdivision (c) of this section for the payment of maturities and withdrawals: provided however, that no more than one-third of the net receipts as defined in subdivision (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided, further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 188 of the New Jersey Pamphlet Laws of 1937 p. 832

An Act to establish all the public statute law of a general nature of the State of New Jersey in the form of a revision, consolidation and compilation, to be known as the Revised Statutes.

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

1. The revision, consolidation and compilation prepared under the direction of the Legislature by the Revision Commission appointed under chapter seventy-three of the laws of one thousand nine hundred and twenty-five presented to the Legislature by the Commission upon the twentieth day of December, one thousand nine hundred and thirty-seven, be and the same is hereby adopted as all the public statute law of the State of New Jersey of a general nature.

2. This statute and the revision, consolidation and compilation so adopted as aforesaid and incorporated herein shall in all respects, and whether revision, consolidation or compilation, be known as the Revised Statutes.

3. The Revised Statutes as hereinbefore defined and as hereinafter enacted, shall take effect immediately.

And be it further enacted, That
Approved December 20, 1937.

Revised Statutes of New Jersey of 1937—Title 17: Chapter 12, par. 53

Payment of maturities and withdrawals

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts" as used in this section shall be construed to mean the moneys, other than borrowed moneys, received by any such association less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notice shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not

thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

f. The Board of directors of any such association shall have the right in its discretion, to make available additional funds other than those required in paragraph "c" of this section for the payment of maturities and withdrawals; but no more than one-third of the net receipts as defined in said paragraph "c" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid.

Source L. 1925, c. 65, Sec. 52, p. 212, as am. by L. 1932, c. 102 sec. 1, p. 175, L. 1935, c. 59, sec. 11, p. 153, L. 1936, c. 118, Sec. 4, p. 295.

Revised Statutes of New Jersey of 1937 Title 1: Chapter 1. Par. 4

1:1-4. Construction as continuation of heretofore existing laws. The provisions of the Revised Statutes, not inconsistent with those of prior laws, shall be construed as a continuation of such laws.

Revised Statutes of New Jersey of 1937 Title 1, Chapter 1, Par. 5

1:1-5. Classification and arrangement; effect on construction. The classification and arrangement of the several sections of the Revised Statutes have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom.

Revised Statutes of New Jersey of 1937 Title 1, Chapter 1— Par. 5.1

1:1-5.1. Citation of, pleading or otherwise referring to legislation contained in Revised Statutes. The legislation contained within any title, sub-title, part, chapter, article, section or group of sections of these Revised Statutes may be cited, pleaded or otherwise referred to by reference to such title, subtitle, part, chapter, article, section or group of sections of the "Revised Statutes" containing such legislation; and the use of the words "Revised Statutes" shall have the same effect as if the legislative title under which these Revised Statutes were adopted and the approval date thereof had been used.

In any citation the abbreviation "R. S." shall be equivalent to "Revised Statutes", and sections of these Revised Statutes may be cited by section number only preceded by such abbreviation.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,

Appellee.

APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF ON BEHALF OF APPELLANT.

WALTER P. REILLY,
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INDEX.

Subject Index.

	PAGE
New Jersey Court of Errors and Appeals—Opinion where Officially Reported	Title Page
Statement of Case	1
Specification of Assigned Errors Intended to be Urged	5
Argument	
Summary	8
Point I—The case at bar involves definite contract obligations and rights of property	12
A. Executory contracts as well as executed contracts come within the inhibitions of Article 1, Section 10 of the Constitution of the United States of America	16
B. The appellant has a vested contract right which cannot be impaired by subsequent legislation	18
C. What contract obligations and property rights existed	23
Point II—New Jersey 1937 Revised Statutes 17:12-53 and its sources impairs the contract obligation and takes property to which appellant was entitled	26
Contract Obligations	26
Property Rights	29
Point III—The police power does not save the legislation from unconstitutionality	31

PAGE

Point IV—The legislation in question is unreasonable, unjust and discriminatory and the means adopted by the subsequent legislation is not reasonably adapted to the accomplishment of its alleged purpose 37

CONCLUSION 47

APPENDIX 49

TABLE OF CASES AND OTHER CITATIONS.

Bedford vs. *Eastern Building & Loan Association*, 181 U. S. 227, 240 ..... 9, 14

Bouvier's Revised Law Dictionary, page 660 17

Bronson vs. *Kinzie*, 1 How. 311, 317 ..... 25, 34

Braunstein vs. *Jersey City*, 98 N. J. L. 479 33

Bucsi vs. *Longworth Building and Loan Association*, 119 N. J. Law 120 ..... 5, 12, 26, 31, 35, 39

Chicago R. I. & P. R. Co. v. *United States*, 284 U. S. 80, 96, 76 L. Ed. 177, 186 30

Coombes vs. *Getz*, 285 U. S. 434 ..... 9, 19, 20, 21

Ettor v. *Tacoma*, 228 U. S. 148, 156 ..... 9, 19

Eubank v. *Richmond*, 226 U. S. 137, 57 L. Ed. 156 .. 11, 42

Farrington v. *Tennessee*, 95 U. S. 679 ..... 9, 17

First Trust Co. of Lincoln vs. *Smith*, 134 Neb. 84, 277 N. W. 762 35

First Trust Joint Stock Land Bank of Chicago vs. *Arp.*, 225, Iowa 331, 283 N. W. 441 35

Fletcher vs. *Peck*, 6 Cra. (U. S.) 87, 3 L. Ed. 162 .. 9, 16

Fornataro v. *Atlantic Coast Building and Loan Association*, 10 N. J. Misc. 1248, 163 A. 240 14

French vs. *Wolfson*, 88 N. J. L. 669 13

Home Building and Loan Assocn. vs. *Blaisdell*, 290 U. S. 398 ..... 10, 34, 36, 39

PAGE

Jefferson Standard Life Ins. Co. vs. *Noble*, Sup. Ct. of Miss. (not yet officially reported) 188 So. 289... 36

Louisiana v. *New Orleans*, 102 U. S. 203-206..... 25

Nebbia vs. *New York*, 297 U. S. 502..... 10

National Mutual Building and Loan Association vs. *Brahan*, 193 U. S. 635 14

Pacific Mail SS. Co. v. *Joliffe*, 69 U. S. 450, (2 Wall.) 9, 19, 21

Rocker vs. *Cardinal Building & Loan Association*, 119 N. J. Law 134 5

Rocker vs. *Cardinal Building & Loan Association*, 13 N. J. Misc. 411, 179 A. 667 ..... 15, 16

Seibert v. *Lewis*, 122 U. S. 284..... 25

A. L. Schechner Corporation v. *United States*, 295 U. S. 495 41

Treigle v. *Acme Homestead Association*, 297 U. S. 189 .....8, 9, 10, 13, 16, 23, 31, 33, 37

Treigle v. *Acme Homestead Association*, 181 Louisiana, 941 (160 Southern 637) 15, 33

Von Hoffman vs. *Quincy*, 71 U. S. 535, 4 Wall. 535, 18 L. Ed. 403 24

Washington ex rel. Seattle Title Trust Co. vs. *Roberge*, 278 U. S. 116 .....10, 11, 44

Worthen v. *Thomas*, 292 U. S. 426..... 39

Sixth Ward Building and Loan Association of Newark, N. J. By-Laws 49

PAGE

LEGISLATIVE ACTS OF NEW JERSEY:

P. L. 1925, Chapter 65, pp. 211, 212 and 213
Section 49, Section 52 . . 1, 2, 3, 6, 18, 23, 37, 49

P. L. 1932, Chapter 102, pp. 175, 176
Section 52 . . . . . 2, 3, 6, 27, 50

P. L. 1935, Chapter 59, pp. 153, 154, 155
Section 52 . . . . . 3, 6, 52

P. L. 1936, Chapter 118, pp. 295, 296, 297
Section 52 . . . . . 3, 4, 6, 54

P. L. 1937, Chapter 188, p. 832 56

Revised Statutes of New Jersey of 1937:

Title 17: 12, par. 53 . . . . 2, 4, 5, 6, 9, 10, 12, 18, 26, 27, 28, 29, 35, 38, 39, 40, 47, 57

Title 1: Chapter 1, Par. 4 59

Title 1: Chapter 1, Par. 5 59

Title 1: Chapter 1, Par. 5.1 59

Opinion of the New Jersey Court of Errors and Appeals Where Officially Reported.

This opinion is officially reported as follows:

Title	Official Report
Viex v. *Sixth Ward Building and Loan Association of Newark, New Jersey*	123 N. J. Law 356.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,
vs.
SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,
Appellee.

On Appeal from New Jersey Supreme Court.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

On October 1, 1928 appellant purchased twenty-five prepaid shares and on October 2, 1928 seventeen and one-half prepaid shares of the appellee Building and Loan Association of a par value of $200.00 each for which the appellant paid the appellee the sum of $8,500.00 (R. 1 and 4), and by the terms of the certificates issued to the appellant therefore, the appellee agreed to pay the appellant six (6) per centum per annum interest on the face value of said shares (R. 10A and 10B).

At the time said shares were purchased as aforesaid the New Jersey Statute, Pamphlet Laws 1925 Chapter 65 provided that shares may be withdrawn at any time by

giving such written notice as the constitution or by-laws of the association provided, not to exceed 30 days and that in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any court of competent jurisdiction if the same is not paid in six months from the date of the giving of said notice of withdrawal (R. 2 and appendix hereto p. 49).

At the time said shares were purchased Article XIX of the Constitution of the appellee Building and Loan Association provided for the withdrawal of prepaid certificates upon giving thirty days written notice (R. 2 and appendix hereto, p. 49).

On August 17, 1932 the appellant gave the appellee Building and Loan Association written notice of withdrawal of said shares, thirty days thereafter, six months thereafter and on many other occasions he demanded payment of the withdrawal value of his shares with interest, but payment with refused (R. 2).

At the time such demands were made the appellee Building and Loan Association was and still is solvent (R. 3 and 5).

Subsequent to the date of appellant's withdrawal notice payments have been made by the appellee upon other withdrawal applications (R. 3 and 5).

The appellee association framed its answer setting up as a defense 1937 Revised Statutes of New Jersey 17:12-53 (R. 5) *source* New Jersey Pamphlet Laws of 1925, Chapter 65, Section 52, page 212; New Jersey Pamphlet Laws of

1932, Chapter 102, Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935, Chapter 59, Section 11, page 153 and New Jersey Pamphlet Laws of 1936, Chapter 118, Section 4, page 295.

We set forth above the source of 1937 Revised Statutes of New Jersey because the history of that legislation is as follows:

On April 22, 1932 the New Jersey Legislature amended section 52 of the 1925 Act to read as set forth in the appendix to this brief (Appendix, p. 50).

The important distinction between this and the 1925 Act is that the 1932 Act omitted the provision of the 1925 Act which gave the right to a withdrawing shareholder to institute suit and recover the withdrawal value of his shares if the same were not paid within six months from the date of his withdrawal notice, and substituted therefore a withdrawal list from which the withdrawing members were entitled to receive $500.00 in rotation each month, if funds were available for that purpose and if all matured shares were first paid in full. *It also contained a provision that no member should have the right to bring suit against the association so long as the funds of the association were applied as required by this section.*

On March 12, 1935 the New Jersey Legislature again amended Section 52 of the 1925 Act, by Chapter 59 of the Laws of 1935 set forth in the appendix to this brief (Appendix, p. 52). This statute is in different form, but in effect is the same as the 1932 Act except that it authorizes the payment of $50.00 in rotation to each member on the withdrawal list instead of $500.00 and goes into detail regard-

ing the amount of funds which the directors may allocate for the payment of withdrawals and maturities. The 1935 Act also contained the provision that no member should have the right to bring suit against the association so long as the funds of the association were applied as required by that section.

Again the Legislature of New Jersey on May 26, 1936 amended Section 52 of the 1925 Act by Chapter 118 of the Laws of 1936 set forth in the appendix to this brief on page 54 making minor changes to clarify the position of the withdrawing members on the withdrawal list. This statute likewise did away with the right of the shareholder to sue for and recover the withdrawal value of his shares if the same be not paid within six months from the date of withdrawal notice, and specifically provided that no member should have the right to bring suit so long as the funds of the association should be applied as required by that section. The 1937 Revision was enacted on December 20, 1937, and became effective Dec. 2, 1937 (R. S. 1:2-3). In the 1937 Revision, Section 52 of the 1925 Act as amended, by Chapter 118 of the Laws of 1936 was carried verbatim (except for three very minor changes in paragraph "f" thereof) as title 17: Chapter 12, paragraph 53. This is set forth in full in the appendix to this brief (Appendix, p. 57).

The appellant moved to strike the answer on the ground that it failed to set up a defense and based its argument on the contention that 1937 Revised Statutes of New Jersey 17:12-53 and its sources, is in violation of Article 1, Section 10 of the Federal Constitution and Section 1 of the Fourteenth Amendment of the Federal Constitution.

The appellee urged that the said Act is constitutional, and the trial court upheld that contention and struck the complaint. The New Jersey Court of Errors and Appeals upheld the decision of the trial court and held 17:12-53 of the 1937 Revision to be constitutional under the authority of *Busci* vs. *Longworth Building and Loan Association*, 119 N. J. Law 120 and *Rocker* vs. *Cardinal Building & Loan Association*, 119 *id.* 134. The *Busci* case concedes that there is an impairment of the shareholder's contract by the 1932 amendment, which was in force when that case was decided, but justifies that enactment as being a reasonable exercise of the police power of the State.

The *Busci* opinion in the New Jersey Court of Errors and Appeals, *supra*, at page 122 sums up their argument thus:

> "It must be noted that this statute does not, by its terms, limit its operation to the period of an existing emergency and this reason takes it out of the class of mere emergency legislation—so-called. But it is unnecessary to sustain the statute on the temporary ground that it is an emergency statute, because it is sustainable on broad constitutional grounds, as a valid exercise of the reserved power of the State. This so-called reserved power is generally referred to as the police power of the State and extends to all great public needs."

Specifications of Assigned Errors Intended to Be Urged.

Appellant, at the hearing of this cause, will urge the following assigned errors, being assignments numbered 1 to 7 inclusive (R. 16, 17, 18).

1. The New Jersey Court of Errors and Appeals erred in failing to hold that 1937 Revised Statutes of New Jersey 17:12-53 –*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 impaired the obligation of an existing contract between the appellant and the appellee in violation of Article 1, Section 10 of the Constitution of the United States.

2. The New Jersey Court of Errors and Appeals erred in failing to hold that said 1937 Revised Statutes of New Jersey 17:12-53 *source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 deprived the appellant of his property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in failing to hold that said 1937 Revised Statutes 17:12-53 *source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 denied to the appellant the equal protection of the Laws in violation of Section one of the 14th Amendment to the Constitution of the United States.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17:12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it impaired the obligation of appellant's contract with the appellees in violation of Article 1, Section 10 of the Constitution of the United States.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17:12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175; approved April 22, 1932, New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it deprived the appellant of property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

6. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court because said judgment enforced the provisions of 1937 Revised Statutes of New Jersey 17:12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212;

New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 which said statute was unconstitutional as it denied the appellant the equal protection of the Laws in violation of Section 1 of the 14th Amendment to the Constitution of the Uinted States.

7. The New Jersey Court of Errors and Appeals erred in not holding that 1937 Revised Statutes of New Jersey 17:12-53—*source* New Jersey Pamphlet Laws of 1925 Chapter 65 Section 52, page 212; New Jersey Pamphlet Laws of 1932 Chapter 102 Section 1, page 175, approved April 22, 1932; New Jersey Pamphlet Laws of 1935 Chapter 59 Section 11, page 153 and New Jersey Pamphlet Laws of 1936 Chapter 118 Section 4, page 295 to be an unreasonable invasion of the rights of property and an unreasonable impairment of the contract obligation under the guise of police powers, and therefore unconstitutional.

Appellant adopts his assignments of error as his statement of the points to be relied upon.

ARGUMENT.

Summary.

It is proposed to show the unconstitutionality of the statutes in question by establishing the following propositions:

1. The case at bar is controlled by the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189.

2. When a person invested his money in prepaid New Jersey Building and Loans shares and paid cash therefore, all prior to 1932, definite contract obligations and property rights exist which are protected by constitutional guarantee. For when a right has arisen under a contract of which a then existing statute is an integral part, the repeal of the statute does not affect that contract, or affect an action for its enforcement.

Treigle v. *Acme Homestead Association*, 297 U. S. 189;
Coombes vs. *Getz*, 285 U. S. 434;
Ettor vs. *Tacoma*, 228 U. S. 148;
Pacific Mail SS. Co. vs. *Joliffe*, 69 U. S. 450;
Bedford vs. *Eastern Building & Loan Association*, 181 U. S. 227.

3. Executory as well as executed contracts are protected from impairment by the Constitution.

Fletcher vs. *Peck*, 6 Cra. (U. S.) 87, 3 L. Ed. 162;
Farrington v. *Tennessee*, 95 U. S. 679.

4. By the legislation of New Jersey now codified in New Jersey 1937 Revised Statutes 17:12-53, the New Jersey Legislature has impaired the contract obligations existing between the appellant and the Building & Loan Association and has taken appellant's property without due process of law.

5. The police power is reserved to the State, and under it every business may be regulated in a degree for the public welfare, but in a reasonable manner and not arbitrarily or with discrimination. While courts may not pass

on the wisdom of legislation, yet they have full power and it is their duty to determine whether the exercise of the police power is reasonable. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.

Home Bldg. & Loan Ass'n vs. *Blaisdell*, 290 U. S. 398;

Treigle vs. *Acme Homestead Association*, 297 U. S. 189;

Nebbia vs. *New York*, 297 U. S. 502;

Washington ex. rel. Seattle Title Trust Co. vs. *Roberge*, 278 U. S. 116.

6. The Legislation in question bears no reasonable relation to the public welfare and is unjust and discriminatory and the means adopted by the subsequent legislation is not reasonably adopted to the accomplishment of its alleged purpose.

a. The New Jersey Legislation of 1937 is a permanent codification of law on the subject of Building and Loan Associations, and recognizes and affirms throughout the statute what is and has always been the genius of such associations, namely, the right of the shareholders therein to withdraw their investment.

b. When the object sought by the legislation is to save Building and Loan Associations from liquidation and to revive their business in behalf of the public welfare, there is no reasonable relation between that object and the provisions that instead of

paying withdrawals in full as they reach the top of the withdrawal list, such withdrawing members shall each be paid $50.00 in rotation on the list irrespective of when he filed his withdrawal notice, because it is mathematically demonstrable that in a given time precisely the same amount will be paid out in either case.

c. To delegate to the Board of Directors discretionary power unregulated and unfettered to allocate all of the income to reserves indefinitely is unreasonable and unconstitutional.

d. To delegate to the Board of Directors discretionary power unregulated and unfettered to prevent withdrawals indefinitely is unreasonable and unconstitutional especially because the directors themselves are substantial shareholders.

Eubank v. *Richmond*, 226 U. S. 137, 57 L. Ed. 156; *Washington ex rel Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 73 L. Ed. 210.

e. Subsequent legislation forbidding a suit to recover the withdrawal value of Building and Loan shares which was authorized when the contract was made, is unconstitutional.

f. Legislation which delegates to private boards of directors of Building and Loan Associations the unlimited discretionary power to suspend the prior laws regarding withdrawals, by means of an artificial definition of "net receipts" is unreasonable and unconstitutional.

Forward.

May it Please the Court:

We desire preliminarily to make it clear that the appellant's charges of unconstitutionality are directed at the legislation in question only as it affects the appellant; and we do not suggest that the legislation is invalid prospectively. Neither are we concerned with its application to instalment shareholders or to insolvent building and loan associations. Appellant insists only that, as retroactively applied to appellant, who bought and paid in full for his prepaid shares prior to the enactment of the offending provisions, such legislation is invalid, unjust, discriminatory, arbitrary, unreasonable and unconstitutional.

We proceed to a consideration of the constitutional questions involved.

POINT I.

The case at bar involves definite contract obligations and rights of property.

The New Jersey Court of Errors and Appeals has chosen to rest its decision in this case upon *Bucsi* v. *Longworth Building and Loan Association*, 119 N. J. L. 120. That case rested squarely upon the proposition that the statute there in question (Chapter 102 of the Laws of 1932, now 1937 R. S. 17:12-53) deprived the appellant of valuable contract and property rights, which he had enjoyed prior to its enactment, but justified the subsequent statute as a proper exercise of the police power of the State.

The New Jersey Court of Errors and Appeals, in 1913 declared the rights of a withdrawing shareholder under a prior statute which was similar to the 1925 statute by asserting that the right to sue or set off the withdrawal value applies only to solvent associations. This was decided in *French* vs. *Wolfson*, 88 N. J. L. 669; at page 671 the court said:

> "The argument made is that section 39, among other things provides that a shareholder who has given notice of withdrawal may sue for and recover the withdrawal value of his shares in any such association, in any court of competent jurisdiction if the same is not paid in six months from the date of the giving of said notice of withdrawal, a provision not contained in the old act, and hence, by reason of this change in the act, Gaskill *vs.* Pollemus is not applicable to the case *sub judice*. But we think otherwise. *No doubt that this change gave the withdrawing stockholder a right to sue for the book value of his shares at the expiration of six months from the time of giving notice of his withdrawal.* This clearly negatives any right to sue in advance of the expiration of the six months and as a set off is, in effect a counter suit, no such set off could be permitted until the six months had expired. Now, though the six months have expired, the situation has changed and the dissolution of the association has begun. We think the rights of the parties must be determined as of the time when the stockholders resolved on dissolution, since the statute contemplates that the withdrawals shall be withdrawals from a live concern and not from a defunct one. (Italics ours.)

The case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, like the case at bar, deals with a solvent association.

In the case of *Bedford* v. *Eastern Building and Loan Association*, 181 U. S. 227, 240, this Honorable Court in holding that the subscription to building and loan shares constitutes a contract with the association said:

> " • • • By his subscription to stock of the association Bedford became a member of the association —bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised and there were all the elements of a contract."

In the case of *National Mutual Building and Loan Association* v. *Brahan*, 193 U. S. 635—Mr. Justice McKenna, at page 650 said:

> "In that case, (Bedford *vs.* Eastern Building and Loan Association 181 U. S. 227) there was a consummated contract, and we held *invalid a law enacted subsequently that made the enforcement of the contract depend upon the performance of onerous conditions.*" (Italics ours.)

The Courts of New Jersey have held that the offending provisions in the New Jersey Statute are quite similar to the Louisiana Statutes that were under consideration in the *Treigle* case, and adopt the logic of the Louisiana Supreme Court.

In *Fornataro* v. *Atlantic Coast Building and Loan Association*, 10 N. J. Misc. 1248, 163 A. 240, the Supreme Court of New Jersey sustained Chapter 102 P. L. 1932, as constitutional upon the grounds that the act purports to deal with an existing emergency.

The *Fornataro* case, *supra,* was adopted in *Treigle* v. *Acme Homestead Association,* 181 Louisiana 941 (160 Southern 637), wherein Chief Justice O'Neill said (page 644);

> "Our attention is called to similar statutes which have been enacted in many other states during the last few years of the financial depression; and we are not aware of any instance where provisions such as are questioned in this case have been declared unconstitutional by a court of last resort. In Fornataro and Romano *v.* Atlantic Coast Building and Loan Association, 163 A. 240, 10 N. J. Misc. 1248, the plaintiffs being withdrawing shareholders in the association contended that a statute of 1932 (Chapter 102 P. L. 1932 p. 175, N. J. St. Annual 1932 Sec. 27-R 52) similar to the Louisiana statute of 1932 could not deprive them of their rights acquired under a previous statute (Chapter 65 P. L. 1925 52 p. 212, Comp. St. Supp. 1930, 27 R. 52) without violating the obligations of the contract between them and the association. The Supreme Court of New Jersey ruled against the plaintiff's contention. * * * "

In the case of *Rocker* v. *Cardinal Building & Loan Association,* 13 N. J. Misc. 411, 179 A. 667, affirmed by the Court of Errors and Appeals, 119 N. J. L. 134, 194 A. 865; the New Jersey Supreme Court adopted the opinion in the Louisiana *Treigle* case. Judge Cleary said (p. 676):

> "* * * Treigle *v.* Acme Homestead Ass'n. (Louisiana Supreme Court, decided March 4, 1935.) This case deals with facts and statutes quite similar to those under consideration in the case at bar. The logic of that decision is apparent, is applicable to the present situation, and is adopted by this Court. See, also Building and Loan Annals, 1932 pages

299, 307, for the first and excellent statement of the rules of law enunciated in the Fornataro and Treigle cases and upon which this decision is based."

We now have a situation where Louisiana Supreme Court adopts the view as expressed in the *Fornataro* case, and in a decision by the New Jersey Supreme Court in *Rocker* v. *Cardinal Building and Loan Association* (*supra*), affirmed by the New Jersey Court of Errors and Appeals, the Court adopts the logic of the opinion in the Louisiana *Treigle* case, which was reversed by the Supreme Court of the United States, 297 U. S. 189. Quoting Mr. Justice Roberts, pages 194-196:

> "The Statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Article 1, Sec. 10 and Amendment 14 Section 1, of the Constitution. • • • The statute merely attempts for no discernible public purpose, the abrogation of contracts between members and the association lawful when made."

The legislation in the case at bar deprives the appellant of a contractual vested right, and is therefore unconstitutional.

A. Executory contracts as well as executed contracts come within the inhibitions of Article 1, Section 10 of the Constitution of the United States of America.

In the celebrated case of *Fletcher* vs. *Peck*, 6 Cra. (U. S.) 87, 3 L. Ed. 162 on page 133, Mr. Chief Justice Marshall expressed the following opinion:

> "When, then, a law is in its nature a contract, when absolute rights have vested under that con-

tract, a repeal of the law cannot divest those rights * * * "

On page 135 Mr. Chief Justice Marshall said:

"*The constitution of the United States, declares that no state shall pass any bill of attainder expost facto law, or law impairing the obligation of contracts.* (Italics ours) * * * "

"In considering this very interesting question, we immediately ask ourselves, what is a contract? * * * A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do a particular thing; * * * A contract executed is one in which the object of contract is performed * * * *the Constitution uses the general term contract without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former.*" (Italics ours.)

To the same effect:

Farrington v. *Tennessee*, 95 U. S. 679, at page 682, 683.

In *Bouvier's Revised Law Dictionary*, page 660:

"A contract executed transfers a chose in possession. *A contract executory transfers a chose in action.* (Italics ours.) 2 Bla. Com. 443."

at page 483:

Chose in Action.

"A right to receive or recover a debt, or money or damages for breach of contract."

In the case at bar, under the Statute (R. 1 and 2) and By-Laws (R. 2) in existence at the time appellant entered into his contract, the appellant could withdraw his moneys upon thirty days written notice and could sue and recover the withdrawal value of his shares if the same was not paid in six months from the date of giving of said notice of withdrawal.

Therefore, the subsequent Statute (R. 3 and 5) impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Article 1, Sec. 10 and Amendment 14, Section 1 of the Constitution.

B. The appellant has a vested contract right which cannot be impaired by subsequent legislation.

The appellee (in its motion to dismiss) tries to distinguish the New Jersey Statute by stating that our 1925 Statute affords a "statutory privilege" and not an obligation of contract. It attempts to sustain that theory by a lengthy discourse on "legislative history" and "legislative philosophy".

But such a theory has been long since exploded by this Honorable Court.

It is not a mere legislative gratuity or privilege that is conferred by P. L. 1925, Chapter 65, Sections 49 and 52. We are dealing with a contractual relation existing between the corporation and a member, the law existing at the time of the contract being an integral part of it.

Appellant, upon paying his money to the association and accepting its prepaid shares under the 1925 Statute then in force became vested with a valid contract and a valuable property right. It did not arise upon the constitutional

rule of law, but upon the contractual liability created under and in pursuance of the Statute then in force.

> *Coombes* v. *Getz*, 285 U. S. 434, 76 L. Ed. 866;
> *Ettor* v. *Tacoma*, 228 U. S. 148, 156, 57 L. Ed. 773;
> *Pacific Mail S. S. Co.* v. *Joliffe*, 69 U. S. 450 (2 Wall).

In the case of *Ettor* v. *Tacoma, supra*, the State of Washington had by statute imposed a liability on municipal corporations in favor of property owners sustaining consequential damages to their property as a result of street paving operations. While the statute was in force, suit was brought to recover damages inflicted upon an abutting property in consequence of street grading, done by direction of the City of Tacoma. While the suit was being heard, the statute creating the liability was repealed, and the trial court directed a verdict in favor of the City, on the theory that the right of action was statutory, and fell with the statute, there being no saving clause. This judgment was affirmed, by the State Supreme Court; but on a Writ of Error to the Supreme Court of United States it was reversed, the Court saying, page 156;

> "The necessary effect of the repealing Act, as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the City to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—and a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the

law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In the case of *Coombes* v. *Getz, supra*, there was presented a controversy wherein a creditor had brought suit against a director of a corporation, claiming liability by the director for a bill of goods which the creditor had sold to the corporation on open account. At the time the bill of goods was sold, there was a constitutional provision in force in the State of California, which made directors of corporations liable in the event of failure to pay corporate indebtedness by virtue of embezzlement of corporate funds. In this case, the Supreme Court of California held, that the director was not liable, because the constitutional provision creating the liability had been repealed, before the suit of the creditor against the director was reduced to judgment. The Supreme Court of the United States held, however, that the directors, in taking their oath of office, impliedly accepted the obligations imposed by the constitutional provision of the California Constitution; and since the merchandise had been sold to the corporation while this rule of law was in full force and effect, a contract right in the provisions of law was created, which it was incompetent for the State to repeal, and thus to impair the obligation of the creditor's contract.

In each of the two cases just cited, it was contended that the obligation claimed to have been impaired by the subsequent legislation was an obligation imposed by statute merely and subject to legislative repeal, and was not a contractual obligation.

Mr. Justice Sutherland in *Coombes* vs. *Getz, supra,* thus disposes of this contention, at page 442:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. *Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor, (which in every sense was a property right).*" (Italics ours.)

The Court in *Pacific Mail S. S. Co.* v. *Joliffe,* 69 U. S. 450 (2 Wall) expressed the same thought in these words at page 457:

> "The claim of the plaintiff below for half-pilotage fee, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him, his claim to the compensation prescribed by the

statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

Indeed, the fallacious theory advanced by the appellee was raised in the *Treigle* case almost from its inception. An inspection of the record in that case, on file in the library of this Honorable Court discloses that Judge Gleason, in his opinion at page 19 of the Treigle transcript adverts to the "purely statutory" theory advanced by the defendants, and discards it. In the brief in the *Treigle* case filed by the appellee in this Court (page 32) the heading is found as follows "A shareholder's right of withdrawal in a building and loan association is purely statutory, is always within the control of the Legislature and may be altered by the Legislature in its discretion. It has none of the characteristics of a conventional agreement, or a vested right."

Again, in the brief *amicus curiae*, in behalf of the U. S. Building and Loan League in the *Treigle* cases filed in this Honorable Court, the greater part of that brief is written in an attempt to sustain their fallacious argument that the appellant's rights are not contractual but purely statutory and can be changed or altered at the will of the Legislature.

Again, in the petition for rehearing filed by John Warren in the *Treigle* case in this Honorable Court, in behalf of the Banking Departments of the States of Indiana, Illinois, Wisconsin and Texas, he argues that the Louisiana statute accords but a privilege to the withdrawing shareholder and not a contractual or vested right.

Thus it appears that this matter of "statutory privilege" as distinguished from a contractual and vested right

was fully presented to this Honorable Court in the *Treigle* case and we respectfully submit that the decision in that case 297 U. S. 189 lays that fallacious notion to rest for all time in the following words at page 194:

> "The statute impairs the obligation of appellants' contract and destroys his vested rights in contravention of Article 1, § 10 and Amendment 14, § 1 of the Constitution."

C. What contract obligations and property rights existed.

Let us see what were the obligations of the contract and property rights of appellant.

1. The association had become obligated to pay appellant the amount of his investment on 30 days notice.

2. The association had become obligated to pay appellant 6 per centum per annum on his investment.

3. Appellant had the right to expect the association to actually allocate 50% of its gross receipts each month for the payment of withdrawals.

4. When the appellant's name reached the top of the withdrawal list the association became obligated to pay him the withdrawal value of his shares before any other member should be paid.

5. When appellant's notice of withdrawal had been on file for 6 months he had an absolute right to immediate payment.

6. When the ordinary allocations to withdrawals was not sufficient to liquidate all withdrawals prior to appellant's within six months from his giving his notice of with-

drawal, the obligation could be judicially enforced by court action.

All of the rights we have enumerated are things the Association was obligated to do. These are true obligations and not mere remedies which do not affect substantially the obligation; we quote the Supreme Court of United States in the case of *Von Hoffman* vs. *Quincy*, 71 U. S. 535, 4 Wall 535, 18 L. Ed. 403 at page 552.

> "It cannot be doubted, either upon principle or authority, that each of such laws passed by a State would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligations to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of the contract 'is the law which binds the parties to perform their agreement'. Sturges *vs.* Crowninshield, 4 Wheat. 122. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green *v.* Biddle, 8 Wheat. 84, it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. *Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently im-*

material in their effect upon the contract of the parties impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage'." (Italics ours.)

In *Bronson* vs. *Kinzie*, 1 How. 311, 317, Chief Justice Taney said:

> "It is difficult perhaps to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so to make the remedy hardly worth pursuing."

In *Louisiana* v. *New Orleans*, 102 U. S. 203, 206, Mr. Justice Fields, in the opinion of the court said:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessons the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

To same effect:

Seibert v. *Lewis*, 122 U. S. 284.

We submit therefore, that not only did the New Jersey Court of Errors and Appeals rest its decision upon the proposition that contract obligations and property rights were involved, but analysis shows this proposition to be sound, that such contract obligations and property rights in fact existed.

POINT II.

New Jersey 1937 Revised Statutes 17:12-53 and its sources impairs the contract obligation and takes the property to which the appellant was entitled.

Appellant denounces as unconstitutional New Jersey 1937 Revised Statutes 17:12-53, and its sources and we have reproduced this section in Appendix page 57. The New Jersey Court of Errors and Appeals in *Busci* vs. *Longworth Building and Loan Association, supra*, at page 130 admits that the appellant was deprived of a vested right of contract which he had enjoyed under the 1925 Act.

Let us, however, advert to New Jersey 1937 R. S. 17:12-53 to discover if and to what extent obligations have been impaired and property taken by this section.

Contract Obligations.

Section 52 of the 1925 Act (Appendix, p. 49) provides for a withdrawal list and payment is required to be made in the order in which the notices shall have been received. In this Act the word "receipts" is used in the ordinary bookkeeping sense, and one-half of said receipts are required to be used for the payment of withdrawal claims.

The 1925 Act further provides that in no case shall payment be postponed for a period longer than six months from the date of such notice and any member may sue for and recover the withdrawal value of his shares if the same is not paid in six months from the date of giving said notice of withdrawal.

The subsequent legislation now codified into New Jersey 1937 Revised Statute 17:12-53 destroys every essential obligation of appellant's contract. It provides that but one-third of the net receipts need be made available for the payment of withdrawals. No longer is the association obliged to pay the withdrawing member the withdrawal value of his shares, upon his reaching the top of the list. The obligation has been impaired so that it becomes an obligation to pay $50.00 in rotation to each member on the withdrawal list *irrespective of the time his name was placed thereon*, with the result that, perhaps in some far off day, he may (or may not) receive what it was the association's contract obligation to pay him in the first place.

And not only this, but furthermore sub-section "d" of the present Act discards completely the ordinary bookkeeping definition of "net receipts" and sets up a completely artificial definition for those words as follows (Appendix, p. 57):

> "* * *; and the words 'net receipts' as used in this section shall be construed to mean moneys, other than borrowed moneys received by any such association *less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any such purposes.*" (Italics ours.)

Think of it! By this completely artificial definition of the words "net receipts" the Legislature has attempted to vest in the Board of Directors absolute discretion and authority to appropriate all of the income of the association *indefinitely* to the above purposes and has attempted to give the Board of Directors absolute power and authority *unfettered* to appropriate the entire income of the association *indefinitely* for the purpose of reserves, without making any provision whatsoever for the payment of withdrawals. None of this is contained in the 1925 Act. This we submit is arbitrary and oppressive legislation. This is not American legislation. It is totalitarian. It is not only an impairment of contract but in fact a complete taking of property without due process of law.

But the worst is yet to come! This new legislation codified in the 1937 Revision 17:12-53 sub-section "e" provides as follows (Appendix, p. 58):

> "e. No member to whom such association shall be obligated for payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section."

So long as the directors in their absolute discretion, unfettered, appropriate all of the income of the association to cash reserves *indefinitely*, every member to whom such association is obligated by contract is perpetually enjoined from exercising any and all of his vested contract rights.

We do not conceive any possible justification for such an enactment. This section wipes out every vestige of obli-

gation of the Association towards its withdrawing members which existed and was vested when the contract was made.

The statute emasculates the contract: It impairs every obligation in question: It divests every property right we have declared upon: It does so without any condition and without offering any compensation.

As to appellant such legislation clearly impairs contract obligations in violation of Section 10 of Article 1 of the Constitution of the United States.

Property Rights.

What we have said above in regard to "Contract Obligations" applies with equal force with respect to the "due process" clause of the Federal Constitution.

1. The new legislation now codified in New Jersey 1937 Revised Statutes 17:12-53 accords to the Board of Directors of the appellee corporation an unregulated discretion in the accumulation of funds. They have absolute discretion and authority to allocate all of the income to expenses and reserves, indefinitely, thereby subjecting the appellant's property or investment in the appellee Association, and its recovery, to a control and power never sanctioned or consented to by the appellant. And this control and power if extended to the extreme possibilities permitted by the statute would make it impossible *ever* to recover any of the moneys invested in the appellee association.

2. Prior to the effective date of the new legislation which is now codified in New Jersey 1937 Revised Statutes 17:12-53 appellant was possessed of a "property right" and a "vested right" to enforce return of his investment by mandatory process, and to recover his money with in-

terest on 30 days notice; and such "property rights" and "vested causes of action" were acquired for a valuable consideration which consisted in his payment in full for his shares and his surrender of any and all right to participate in the general profits of the association.

3. The complete abrogation of this "property right" and "vested cause of action" (whichever it may variously be called), by the provisions of the new legislation, constitutes a "taking" whether for a "public purpose" or a "private benefit", and in either case violates the provisions of the Federal Constitution.

To constitute a "taking" of property, within the meaning of the 14th Amendment of the Federal Constitution, it is unnecessary that there be an out and out appropriation of the physical property.

In *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 96, 76 L. Ed. 177, 186, the Supreme Court said:

> "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title. Chicago, N. & S. P. R. Co. *v.* Minnesota, 134 U. S. 418, 458, 33 L. Ed. 970, 981, 3 Inters. Com. Rep. 209, 10 S. Ct. 462, 702; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362, 410, 412, 38 L. Ed. 1014, 1027, 1028, 4 Inters. Com. Rep. 560, 14 S. Ct. 1047; Chicago, M. & S. P. R. Co. *v.* Wisconsin, 238 U. S. 491, 498, 499, 59 L. Ed. 1423, 1429, 1430, L. R. A. 1916 A, 1133, P. U. R. 1915 D, 706, 35 S. Ct. 869. The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of

> the 5th Amendment. Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U. S. 1, 20; 51 L. Ed. 933, 942, 27 S. Ct. 585, 11 Am. Cas. 398."

As already pointed out, the new legislation now codified in New Jersey 1937 R. S. 17:12-53 abolishes in specific and unambiguous language, all obligation on the part of the Building and Loan Associations to set aside or allocate any definite segment of "receipts" from which withdrawing shareholder's investments may be discharged. Then, in what seems to have been an extra effort to insure the accomplishment of this purpose, the Legislature leaves to the unregulated and uncontrolled discretion of the board of directors, not only the discharge of the duty or obligation but the sole control, administration and the amount of funds to be accumulated for the purpose.

POINT III.

The police power does not save the legislation from unconstitutionality.

We consider this point to have been set at rest for all time in this Honorable Court by its decision in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189—in these words, at 197:

> "The Legislature has no greater power to interfere with the private contracts of such corporations, or vested rights of their stockholders as such under the pretext of public necessity, than it would have to attempt the same ends in a case of a private corporation."

The New Jersey Court of Errors and Appeals decided the case of *Bucsi* v. *Longworth Building and Loan Associa-*

tion (supra), after the decision in the *Treigle* case was rendered by this Honorable Court, and in fact in the *Bucsi* case they mention and quote from the *Treigle* decision. However, in the *Bucsi* case they say, 119 N. J. Law 120, 127:

> "It may very well be that the statute in Louisiana was not passed 'for an end which is in fact public' but the situation which faced our Legislature in 1932, if allowed to run unregulated to its apparent and ultimate economic conclusion, would have affected adversely every person in this State."

The Court proceeds to recite the economic conditions as they are alleged to have existed in New Jersey in 1932 and proceeds as follows at page 130:

> "The structure of the tax base and the widespread membership in building and loan associations, and the fact that the value of the real estate mortgages and real property owned by such associations represent a high percentage of the total value of all taxable real estate in the state, creates a situation which is peculiar to this state. It does not appear from the record of briefs in the Treigle *v.* Acme Homestead Ass'n, *supra*, that a comparable situation exists in Louisiana."

It is respectfully submitted, however, that these very questions and proofs were before this Honorable Court when the *Treigle* case was argued. An examination of the record and briefs in the *Treigle* case on file in the Library of this Honorable Court discloses that the original answer filed by the defendant in the court of first instance under paragraph XV (*Treigle* record, pp. 13, 14, 15, 16 and 17), are concerned exclusively with a recital of the adverse effects of the economic depression in Louisiana

upon the building and loans of that state. Judge Gleason, sitting in the Court of first instance nevertheless sums it all up in these words (*Treigle* record, p. 30):

> "If these provisions are defensible under our constitutional guarantees, one might as well write out of the constitution these fundamental guarantees of government, and leave to the whims of the respective legislatures the destiny of all contractual relations."

The opinion of the Supreme Court of Louisiana in *Treigle* vs. *Acme Homestead Association*, 181 La. 941, treats this situation.

Again the economic situation in Louisiana was discussed at page 13 of the appellee's brief in the *Treigle* case, and the economic effect of the depression upon Building and Loan Associations in Louisiana.

An examination of the *Treigle* record and briefs, therefore discloses that when the New Jersey Court of Errors and Appeals in the *Bucsi* case stated that it does not appear from the records and briefs in *Treigle* v. *Acme Homestead Association, supra*, that a comparable situation exists in Louisiana, that honorable court was in error. In fact, the record and briefs in the *Treigle* case disclose that the identical situation which the New Jersey Court of Errors and Appeals alleged to exist in New Jersey was also alleged by the appellee in the *Treigle* case to exist in Louisiana and was even set forth in detail in the very first pleading filed by the appellee in the *Treigle* case. Furthermore, the New Jersey Court of Errors and Appeals, passed upon this very question prior to the *Bucsi* case in *Braunstein* v. *Jersey City*, 98 N. J. L. 479 (p. 480):

> "* * * The arguments of emergency and 'police power' alluded to in the other case are reiterated here * * * are authority for the validity of the statute under which exemption from tax is now claimed. On this phase of the case it is sufficient to say that the statutes involved in those decisions related in no way to tax exemption, nor to any repugnancy of a state statute to a plain mandate in a state constitution, but to statutes affecting the contract relation of landlord and tenant, with which we are in no way concerned at this time, and hence we deem them inapplicable and irrelevant to the question before us, which is, whether the Exemption Act of 1920 is plainly in violation of the constitutional provision that property shall be assessed for taxation under general laws and by uniform rules according to its true value, as it manifestly is, can be supported on any theory of 'emergency' or of so called 'police power'. *As to this, we specifically concur in the view expressed by the Supreme Court in the Koch case that a pressing emergency is no ground for violation of a constitutional provision, and that the 'police power' broad as it is, cannot be exercised in defiance of constitutional limitations.*" (Italics ours.)

Finally, upon this phase of the case, we would refer to the long line of decisions in which statutes of this sort, which have sought under the guise of police power to take property rights from, or to impair the contract obligations of one person or class of persons for the benefit of another person or class of persons have repeatedly been held to be unconstitutional.

The *Minnesota Moratorium* case, *Home Building & Loan Association* vs. *Blaisdell*, 290 U. S. 398, cites and discusses them all, from *Bronson* v. *Kinzie*, 1 Howard 311, on down

to the present time; and points out that the protection of one class of persons at the expense of another class may only be justified as emergency legislation if reasonably conditioned. If the legislation is temporary and consideration is allowed for temporary taking of property, the legislation may be constitutional.

The New Jersey 1937 Revised Statutes 17:12-53 is a part of this permanent statutory law of the State and not emergency legislation.

In fact, the New Jersey Court of Errors and Appeals in *Bucsi* v. *Longworth Building and Loan Association (supra)*, specifically admits that this legislation is out of the class of mere emergency legislation.

It should be pointed out that nowhere in the record in the case at bar is it alleged or even suggested that a situation exists *now* in New Jersey similar to that which was alleged to have existed in New Jersey and in Louisiana in 1935-1936, when the *Bucsi* case was decided. Over three years have elapsed since that decision was rendered.

Indeed, some of the very States that a few years ago enacted and so diligently defended their mortgage moratorium laws—have recently declared that a re-enactment of the very same statute is now a violation of the contract clause of the Federal Constitution. We allude to the following cases:

First Trust Co. of Lincoln vs. *Smith*, 134 Neb. 84; 277 N. W. 762;

First Trust Joint Stock Land Bank of Chicago vs. *Arp.*, 225 Iowa 331; 283 N. W. 441;

Jefferson Standard Life Ins. Co. vs. *Noble*, Sup. Ct. of Miss. (not yet officially reported) 188 So. 289.

All of the above illuminating decisions are based on a two-fold proposition: (1) an emergency connotes a crisis or catastrophe—By the very word itself it cannot continue as an emergency for any great length of time, for, if it does continue, it ceases to be an emergency and becomes a status—a normal situation, and (2) times have materially improved since 1932 so that we do not have *now* a situation comparable to that which then existed. These cases review the economic situation of the Nation as of 1934 and compare that with the economic situation *now*. They all find that the situation today has so generally improved that the emergency—the crisis—is past. They therefore conclude that the principal enunciated in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 no longer applies, and the police power today does not save this legislation from the attack of unconstitutionality.

What is true in those States undoubtedly is true in New Jersey today. The emergency is past. The necessity of invoking the police power is over, and the inhibition contained in the Federal Constitution against the impairment of contracts is again supreme.

POINT IV.

The legislation in question is unreasonable, unjust and discriminatory and the means adopted by the subsequent legislation is not reasonably adapted to the accomplishment of its alleged purpose.

In *Treigle* vs. *Acme Homestead Association, supra,* Mr. Justice Roberts in referring to the Louisiana legislation said, at 196:

> "Under existing law, and the appellants contract, 50 per cent of the receipts of the association had to be set apart to pay withdrawing members. By the new legislation this requirement is abolished and the amount to be set aside is left to the sole discretion of the directors. They are authorized to apply the association's receipts to the making of loans, to the payment of old or new debts, to dividends to continuing members or to the creation of a cash reserve for future dividends. *The sections permitting such use of the amounts collected do not tend to conserve the assets of the association, to render it more solvent, or to insure that its affairs will be administered so as to protect the investments of the continuing and withdrawing members. They do alter the rights of the withdrawing members as between themselves and as against continuing members.*" (Italics ours.)

An examination of the New Jersey Statutes clearly discloses that this legislation, like the Louisiana legislation, is open to the same criticism.

The 1925 Statute of New Jersey provides that one-half of the receipts of the association shall be required to be

used for the payment of withdrawal claims until the oldest of such claims then unpaid shall have been on file for a period of six months, but in no case shall payment be postponed for a period longer than six months, and after the six months period any member may sue for and recover the withdrawal value of his shares. By the new New Jersey legislation these requirements are abolished and the amount to be set aside is left to the discretion of the directors. They are authorized to use what income they see fit for operating expenses of all kinds, for the payment of creditor obligations, old and new, for the conservation, preservation and protection of the property and assets of the association and for establishing reserves for any of such purposes. The balance of the income, if any there be, is to be used one-third for the payment of maturities, one-third for the payment of withdrawals, and no provision is made for the disposition of the balance, so it may be used for new loans if the directors so determine. The new legislation of New Jersey further provides that no member shall have the right to bring suit against the association for the recovery of the withdrawal value of his shares so long as the funds of the association shall be applied as required by that section. It is clear, therefore, that the new New Jersey legislation like the new Louisiana legislation does not tend to conserve the assets of the association to render it more solvent or to insure that its affairs will be administered so as to protect the investments of the continuing and withdrawing members. The new legislation in New Jersey does alter the rights of the withdrawing members as between themselves and as against continuing members.

It is quite evident that if the legislation in question does not bear reasonable relation to the public welfare, or

is arbitrary or discriminatory, then, if it impairs the contract obligations or takes property without due process, it is unconstitutional.

Worthen v. *Thomas*, 292 U. S. 426;
Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398.

The New Jersey Court of Errors and Appeals in its opinion in *Bucsi* vs. *Longworth Building and Loan Association, supra,* said that the legislation in question is not arbitrary or capricious and bears reasonable relation to a legitimate end. But, with due respect, we say that that Honorable Court has fallen into grievous error in its appreciation of the relationship between the sections of the 1937 Revision under discussion and the object sought to be attained by the Legislature.

Let us take sub-section "d" of the 1937 Revision 17:12-53 which provides for the payment of withdrawals at rate of $50.00 to each member in rotation as his name may appear on the withdrawal list. There is *no reasonableness whatever* in this provision of the act with respect to saving Associations from liquidation, because it is a very simple mathematical proposition that in a given space of time they will pay out *exactly the same amount* under the $50.00 rotation system as they would if they had paid 100% to each withdrawing member as he reached the top of the list.

No, may it please the Court, all the $50.00 rotation system of 1937 R. S. 17:12-53 does is to take the greater part of what was already vested in me and pay it to somebody else—no reasonable relation here, but arbitrary re-distribution of wealth!

There never has been a decision in the Supreme Court of the United States that remotely suggests the constitutionality of a Statute enacted under the guise of saving an industry from possible destruction—the real and only possible purpose of which is to destroy contract obligations and to divest and take vested property rights in order that other private citizens may have, use and enjoy those rights.

When we examine sub-section "d" 1937 R. S. 17:12-53 further we find a more unreasonable and intolerable situation.

Instead of the provisions of the 1925 Act and the contract between the appellant and Sixth Ward Building and Loan Association that at least one-half of the net receipts must be allocated to the payment of withdrawals and that after six months the withdrawing member may sue for and recover the withdrawal value of his shares, this new section vests in the board of directors of each association the absolute and unregulated discretion to allocate nothing whatsoever to "net receipts", one-third of which must be made available for payment of withdrawals and at the same time the uncontrolled and absolute discretion to set up and create reserves of every kind, including cash reserves, unlimited as to amount and to pay creditor obligations, old and new, to incur and pay operating expenses of all kinds.

Now, it is to be borne in mind that no standard is fixed by the Legislature by which the discretion of the directors is to be regulated. The discretion is unregulated.

This is not exercise of police power by the Legislature, it is a delegation of police power by the Legislature to a

private board. This is contrary to the decision of *A. L. Schechner Corporation* v. *United States*, 295 U. S. 495, when read in the light of Articles 3 and 4 Section 1 of the New Jersey State Constitution.

Not only that! The Legislature by the very act stamps with its approval the payment in full of withdrawals when the 1937 statute directs the directors to allocate one-third of the so-called "net receipts" for that purpose.

Therefore, the Legislature has not declared or determined that withdrawals should be prevented, curtailed or obstructed as inconsistent with public welfare. The Legislature has nowhere declared or provided that withdrawals should be regulated for any given time or under any set of circumstances.

The Legislature merely vests in a board of directors the absolute and unregulated discretion to prohibit all withdrawals indefinitely, by allocating nothing with which to pay them, and at the same time to continue to use the original money invested by the withdrawing shareholder without paying him any dividends whatever.

The legislation as contained in New Jersey 1937 R. S. 17:12-53 is unconstitutional because police power must be exercised by the sovereign through the law making body and cannot be delegated to private persons or private boards especially unguided by any prescribed standard, and more particularly when such private boards are possessed of rights and privileges which are augmented and furthered to the same degree as they by their actions derogate from the rights and privileges of others. *Directors are also substantial shareholders.*

This Court has at least twice declared unconstitutional such delegations of power.

In *Eubank* v. *Richmond*, 226 U. S. 137, 57 L. Ed. 156, the Court had before it a situation very similar to the instant case.

In that case an ordinance of the City of Richmond, Va. enacted under authority of a legislative act of that State, provided that whenever two-thirds of the property owners fronting on a street petitioned the Commission on Streets to fix the building line along the street, the Commission was required to fix said line within limits of 5 to 30 feet from the street line. Eubank, the plaintiff, had, before passage of the ordinance obtained a permit to erect a dwelling and had ordered material for its construction, although actual building had not commenced, when he was notified that the bay-window of his proposed house projected over the line thus fixed, by three feet. He was ordered to revise his plans accordingly. Suit was filed attacking the constitutionality of the statute and ordinance, on the ground that it operated to deprive him of property "without due process of law". The Supreme Court of Virginia upheld the statute and ordinance, but on Writ of Error to the Supreme Court of the United States the action of the state court was reversed, the court saying, at page 143:

> "It (the statute and ordinance) leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall

make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. * * * The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others. * * * One person, having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by the owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

We submit the control granted to the board of directors of the defendant associations over the property and rights

of appellant by the provisions of the 1937 Act are no less offensive to the provisions of the Federal Constitution than in the *Eubank* case. They constitute a "taking", and are not justifiable under the "police power".

In the case of *Washington, ex rel Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 73 L. Ed. 210, the court again applied this principle.

The City of Seattle in 1923 passed a comprehensive zoning ordinance dividing the city into six "use" districts, and provided that no building might be erected for any purpose other than that permitted in the district in which the site is located.

Since 1914 Seattle Title Trust Co. as trustee owned and maintained in one of these "use" districts a philanthropic home for aged poor. The trustee proposed to replace the building with a larger and more modern building on the same site, which would have been in no sense a nuisance.

The site was in the "first residence district", where dwellings, schools, churches, banks, boarding houses, etc. were permitted. In 1925 an amendment to the ordinance provided that "a philanthropic home for children or old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two-thirds of the property within 400 feet of the building."

The trustee, when he was refused a permit without such written consent, resisted the ordinance as invalid, as repugnant to the due process clause.

The Court held the ordinance unconstitutional, saying at page 121:

"The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. Yick Wo *v.* Hopkins, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 225, 226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment. Eubank *v.* Richmond, 226 U. S. 137, 143, 57 L. Ed. 156, 158, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914 B. 192; Browning *v.* Hooper, 269 U. S. 396, 70 L. Ed. 330, 46 Sup. Ct. Rep. 141."

We earnestly submit that in the 1937 Act there is no legislative determination that withdrawals by shareholders would be inconsistent with public welfare. Perhaps the Legislature might have for a limited time forbidden withdrawals. But they did no such thing. They permit, they sanction withdrawals and so indicate plainly that they find the withdrawal of shares in harmony with the public interest.

After doing this, the Legislature takes away all power of the Courts to compel allocation of any portion of net receipts to a fund to accomplish withdrawal; and moreover, in delegating the unregulated power to the numerous boards of directors of the Building and Loans to determine the amount or segment of revenues, if any at all, to be allocated to withdrawals, the legislature has placed in the hands of continuing members of the Associations the power to use for their own aggrandizement the property and funds of withdrawing members without compensation and indefinitely.

The provisions of this Act as gleaned from the Act itself have no such relation to the public welfare as to justify the destruction, in a retroactive manner, of the private rights of the appellant. The 1936 statute is now codified in the 1937 Revision as a permanent part of the statutory law of New Jersey. Thus we see it is not an emergency measure.

The right to withdraw the money invested in shares of a Building and Loan Association is the essential difference between such associations and ordinary corporations. This right is the genius of such associations. Nowhere in the new legislation does the Legislature undertake to declare it to be against public welfare that such withdrawals be per-

mitted. On the contrary, the genius of the institution and the public welfare of New Jersey both require the right to withdraw.

The new legislation has, however, left to the withdrawing shareholders no means whatever to enforce their rights; the new legislation has, moreover placed it within the power of continuing members, unrestrained and unregulated by judicial process, to use appellant's property, indefinitely and without compensation and has taken from the appellant, forever, his right to sue for and recover the withdrawal value of his shares.

Conclusion.

We again suggest that the legislation may be constitutional in its prospective application, but that it is clearly unconstitutional as applied retroactively to existing contract obligations and vested rights. We are not here concerned with instalment shareholders or borrowing shareholders. Their rights may be different, but are not here involved. We insist only that the new statutes now codified in New Jersey 1937—Revised Statutes 17:12-53 are unconstitutional as to appellant, a pre-paid shareholder who invested his money and took his shares long prior to their enactment.

We submit that the new statutes now codified in New Jersey 1937 Revised Statutes 17:12-53 denounced by us impair the essential obligations of a contract between appellant and the Association which obligations became fixed vested and mandatory under the 1925 statute; that such new legislation impaired appellant's contract rights and divested his property without due process of law.

We do not dispute that the business of Building and Loan Associations may be, in a measure, regulated under the State's reserved police power, but we insist that all such regulation when it affects contract obligations and property rights must be reasonable—the regulation must be such as has reasonable relation to the legitimate end in view; must be in harmony with the fair interest of the Constitutional limitation.

None such here! But arbitrary impairment of contract and divesture of property rights without due process, unjust discrimination of one shareholder in favor of other shareholders, and a taking of one's property forever. No temporary moratorium as in Minnesota, but permanent retroactive confiscatory and discriminatory legislation which has not been and cannot be justified under our Federal Constitution.

It is respectfully submitted that the judgment of the New Jersey Court of Errors and Appeals and of the New Jersey Supreme Court should be reversed; New Jersey 1937 Revised Statutes 17:12-53 and its various sources from 1932 to its enactment should be declared unconstitutional, and judgment entered in favor of the appellant in accordance with his original complaint.

Respectfully,

WALTER P. REILLY,
JAMES L. HANDFORD,
Counsel for Appellant.

APPENDIX.

By-Laws of the Sixth Ward Building and Loan Association of Newark, New Jersey (R. 67).

ARTICLE XIX. Prepaid shares.

Section 2.—Prepaid shares shall bear interest payable semi-annually on the First day of May and November of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any regular meeting of the Association.

Legislative Acts of New Jersey.

Building & Loan Revision of 1925.

An Act Concerning Building and Loan Associations (Revision of 1925), N. J. Pamphlet Laws of 1925, Chapter 65, Section 49, and 52, pp. 211, 212, 213.

49. How withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such mem-

ber; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section.

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal.

Chapter 102 of New Jersey Pamphlet Laws of 1932, pp. 175, 176.

An Act to amend an act entitled "An Act concerning building and loan associations (Revision of 1925)," approved March twelfth, one thousand nine hundred and twenty-five.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section fifty-two of the act of which this act is amendatory, be and the same is hereby amended so that the same shall read as follows:

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received but not more than one-half of the total receipts of

any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and IV of section twenty-six hereof shall be required to be used for the payment of withdrawals, without the consent of the board of directors; provided however that if in any one month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

2. This act shall take effect immediately.

Approved April 22, 1932.

Chapter 59 of the New Jersey Pamphlet Laws of 1935 (Section 52), pp. 153, 154, 155.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

~~52.~~ Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein:

(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts", as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies used for operating expenses, monies used to pay creditor obligations, monies used for conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then

due and payable, the board of directors of such association shall, so far as possible pay out of such funds, on account of the sum due on each such withdrawal, in the order in which the notices shall have been filed, the sum of fifty dollars or the balance due thereon, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of each such withdrawal, in said order, the sum of fifty dollars or the balance due thereon, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal next following the one on account of which the last such payment was made; and

(e) No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion, to make available additional funds other than those required in sub-division (c) of this section for the payment of maturities and withdrawals; provided however, that no more than one-third of the net receipts, as defined in sub-division (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 118 New Jersey Pamphlet Laws of 1936 (Section 52), pp. 295, 296, 297.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

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(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies used for operating expenses, monies used to pay creditor obligations, monies used for the conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association

shall, so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawing obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

(e). No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion to make available additional funds other than those required in sub-division (c) of this section for the payment of maturities and withdrawals; provided however, that no more than one-third of the net receipts as defined in sub-division (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided, further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 188 of the New Jersey Pamphlet Laws of 1937 Published as P. L. 1938, p. 832.

An Act to establish all the public statute law of a general nature of the State of New Jersey in the form of a revision, consolidation and compilation, to be known as the Revised Statutes.

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

1. The revision, consolidation and compilation prepared under the direction of the Legislature by the Revision Commission appointed under chapter seventy-three of the laws of one thousand nine hundred and twenty-five presented to the Legislature by the Commission upon the twentieth day of December, one thousand nine hundred and thirty-seven, be and the same is hereby adopted as all the public statute law of the State of New Jersey of a general nature.

2. This statute and the revision, consolidation and compilation so adopted as aforesaid and incorporated herein shall in all respects, and whether revision, consolidation or compilation, be known as the Revised Statutes.

3. The Revised Statutes as hereinbefore defined and as hereinafter enacted, shall take effect immediately.

And be it further enacted, That

Approved December 20, 1937.

Revised Statutes of New Jersey of 1937— Title 17: Chapter 12, Par. 53.

Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts" as used in this section shall be construed to mean the moneys, other than borrowed moneys, received by any such association less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable; the board of directors of such association shall so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of with-

drawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notice shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

f. The Board of directors of any such association shall have the right in its discretion, to make available additional funds other than those required in paragraph "c" of this section for the payment of maturities and withdrawals; but no more than one-third of the net receipts as defined in said paragraph "c" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid.

Source L. 1925, c. 65, Sec. 52, p. 212, as am. by L. 1932, c. 102 sec. 1, p. 175, L. 1935, c. 59, sec. 11, p. 153, L. 1936, c. 118, Sec. 4, p. 295.

Revised Statutes of New Jersey of 1937— Title 1: Chapter 1, Par. 4.

1:1-4. Construction as continuation of heretofore existing laws. The provisions of the Revised Statutes, not inconsistent with those of prior laws, shall be construed as a continuation of such laws.

Revised Statutes of New Jersey of 1937— Title 1: Chapter 1, Par. 5.

1:1-5. Classification and arrangement; effect on construction. The classification and arrangement of the several sections of the Revised Statutes have been made for the purpose of convenience; reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom.

Revised Statutes of New Jersey of 1937— Title 1: Chapter 1, Par. 5.1.

1:1-5.1. Citation of, pleading or otherwise referring to legislation contained in Revised Statutes. The Legislation contained within any title, sub-title, part, chapter, article, section or group of sections of these Revised Statutes may be cited, pleaded or otherwise referred to by reference to such title, sub-title, part, chapter, article, section or group of sections of the "Revised Statutes" containing such legislation; and the use of the words "Revised Statutes" shall have the same effect as if the legislative title under which these Revised Statutes were adopted and the approval date thereof had been used.

In any citation the abbreviation "R. S." shall be equivalent to "Revised Statutes", and sections of these Revised Statutes may be cited by section number only preceded by such abbreviation.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,
Appellee.

APPEAL FROM NEW JERSEY SUPREME COURT.

REPLY BRIEF ON BEHALF OF APPELLANT.

WALTER P. REILLY.
JAMES L. HANDFORD,
Counsel for Appellant.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

SUBJECT INDEX.

PAGE

I. The Revised Statute 17:12-53 and all its sources are properly before this Court for its determination as to their unconstitutional effect upon appellant's federal rights, and not solely Pamphlet Laws, 1932, chapter 102 1

II. The Statute of Limitations cannot be interposed as a defense against appellant's rights to sue and recover under his contract 5

III. The withdrawal right is an integral part of appellant's contract and not a mere privilege.... 6

IV. Chapter 102 P. L. 1932 impairs appellant's vested contract rights and his vested property rights 11

V. Chapter 65 P. L. 1925, in so far as applied to appellant, did not make him an equal participant with all the other members 13

Cases Cited.

	PAGE
Adam v. *Saenger*, 303 U. S. 59	3
Bryant v. *Zimmerman*, 278 U. S. 63	4
Bucsi v. *Longworth Building & Loan Association*, 119 N. J. L. 120	12
Cohen v. *Swink*, 3 S. E. (2nd) 471, 476 (Va.)	13
Crowell v. *Randell*, 10 Peters 368	4
Goldrick v. *Gulf Oil Corp.*, 84 Sup. Ct. Rep. 336	4
Honeyman v. *Hanan*, 300 U. S. 14	4
Intiso v. *Metropolitan Savings and Association*, 68 N. J. L. 588	7, 8
Koewing v. *West Orange*, 89 N. J. L. 539	3
Lehigh Valley R. R. v. *United Lead Co.*, 102 N. J. L. 545	3
Lynch v. *New York*, 293 U. S. 52	4
McCullough v. *Virginia*, 172 U. S. 102	3
Morley v. *Railway Co.*, 146 U. S. 162	7
New York v. *Central Savings Bank*, 306 U. S. 661	4
Roby v. *Colehour*, 146 U. S. 153	4
Sautter v. *Supreme Conclave Improved Order of Heptasophs*, 76 N. J. L. 763, 765	10, 11
Smythe v. *Inhabitants of New Providence Township*, 253 Fed. 824, 831	6
St. Louis Iron Mountain and Southern Railway Company v. *Starbird, Administrator of Miller*, 243 U. S. 592	4
Treigle v. *Acme Homestead Association*, 297 U. S. 189	14
Truax v. *Corrigan*, 257 U. S. 312	3

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,
Appellee.

On Appeal from New Jersey Supreme Court.

REPLY BRIEF ON BEHALF OF APPELLANT.

I.

The Revised Statute 17:12-53 and all its sources are properly before this Court for its determination as to their unconstitutional effect upon appellant's federal rights, and not solely Pamphlet Laws, 1932, chapter 102.

We treated this in Point One of our brief filed in opposition to the motion to dismiss this appeal, and will here endeavor merely to supplement what is there said.

The appellee at pages 7 and 8 of its Brief states that the New Jersey Courts did not have R. S. 17:12-53 before them, and could not be required to pass upon the constitutionality of that Act, because appellee alleges that Par. 11

of Appellant's Complaint is argumentative in form and was not answered by the appellee, and because the appellee's answer which specifically pleaded R. S. 17:12-53 as a separate defense was never reached by the New Jersey Courts from the standpoint of testing its legal efficacy. It is respectfully submitted that the appellee has completely lost the effect of those pleadings. It is immaterial for the purpose of this argument to consider their legal efficacy. The effect of those pleadings was to apprise and did apprise the New Jersey Courts that the sole question involved was the constitutionality of R. S. 17:12-53 and its sources enacted from 1932, as these later statutes effect appellant's contract.

The New Jersey Courts were aware of this for the further reason that appellee served Notice of Motion to Strike the Complaint of appellant (R. 8), and therein specifically set up R. S. 17:12-53 as the ground of its motion to strike.

When the trial court ruled in favor of appellee's motion, it necessarily held adversely to the appellant's Federal Rights as set forth in his Complaint (R. 1, 2, 3 and 4); which ruling had to be based upon the grounds set forth in appellee's motion to strike the Complaint, and further the appellant's grounds of appeal to the New Jersey Court of Errors and Appeals specifically set forth the unconstitutionality of R. S. 17:12-53 (R. 11, 12).

The legal effect of appellee's Notice to Strike the Complaint (R. 8) is the same as a demurrer at common law (Rule 40 of the New Jersey Supreme Court).

Under Rule 40 when appellee moved to strike the appellant's complaint on the grounds set forth in its notice, the effect of the motion was equivalent to a demurrer, admitting facts well pleaded but not conclusions of law. *Ko-*

ewing v. *West Orange*, 89 N. J. L. 539 (Ct. of E. and A.); *Lehigh Valley R. R.* v. *United Lead Co.*, 102 N. J. L. 545.

Therefore, the appellee by its notice to Strike the Complaint admitted the allegations contained in the appellant's complaint which were well pleaded. The effect of this would entitle appellant to his claim under P. L. 1925, sec. 52, unless R. S. 17:12-53 be constitutional. Hence the only issue before the lower court was the question of the constitutionality of R. S. 17:12-53 and all its sources; which the lower court could only rule upon in dismissing appellant's complaint upon the ground of no cause of action (R. 10). The Court of Errors and Appeals in ruling upon the action of the lower court could only test the legal efficacy of the complaint by ruling on the constitutionality of R. S. 17:12-53. *Truax* v. *Corrigan*, 257 U. S. 312; *Adam* v. *Saenger*, 303 U. S. 59.

In *McCullough* v. *Virginia*, 172 U. S. 102, it was contended that the Supreme Court had no jurisdiction of this case for the reason that the State Court of Appeals did not consider in its opinion the subsequent legislation of the State, passed with a view to impair the Act of 1871, but limits itself to the consideration of that act. On page 116 the Court said:

> "It is true the Court of Appeals in its opinion only incidentally refers to Statutes passed subsequent to the Act of 1871, and places its decision distinctly on the ground that the act was void insofar as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, *and it has been repeatedly held by this Court that in reviewing the judgment of the Courts of a State we are not limited*

to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision." (Italics ours.)

In the case of *Crowell* v. *Randell*, (1836) 10 Peters 368, 392, Mr. Justice Story said (p. 392):

> "The principal, perhaps, the only important difficulty, which has ever been felt by the court, has been in ascertaining in particular cases, whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it be clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment."

To the same effect are the following cases: *St. Louis Iron Mountain and Southern Railway Company* v. *Starbird, Administrator of Miller*, 243 U. S. 592; *Bryant* v. *Zimmerman*, 278 U. S. 63; [illegible] v. *Colehour*, 146 U. S. 153; *Lynch* v. *New York*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *New York* v. *Central Savings Bank*, 306 U. S. 661; *McGoldrick* v. *Gulf Oil Corp.*, 84 Sup. Ct. Rep. 336.

In the case at bar the record before the Court of Errors and Appeals made it imperative that the court decided whether or not the Federal Rights of the appellant were violated by R. S. 17:12-53; and, if there is any question as

NEW JERSEY COURT OF ERRORS AND APPEALS

HARRY M. VEIX,
Plaintiff-Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORP.,
Defendant-Respondent.

NOTICE.

To Walter P. Reilly, Esq., Counsel for Plaintiff-Respondent:

PLEASE TAKE NOTICE, that on Monday, February 5th, 1940, at 10:30 A. M., or as soon thereafter as the court can hear the same, we shall make application to the Court of Errors and Appeals at the State House, Trenton, New Jersey, and bring to the court's attention the fact that the above-named appellant in his appeal of this case to the Supreme Court of the United States contends that this court has decided 1937 Revised Statutes of New Jersey, 17: 12-53, to be constitutional.

The respondent contends that the court only decided that Chapter 102 Pamphlet Laws 1932 amending Chapter 6 5 Pamphlet Laws 1925 was constitutional and we shall ask the court if it deems proper that the opinion and decision in the above case be clarified and for such other and further relief as may be necessary in the premises.

MULLIGAN & KOENIG,
Counsel for Defendant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

HARRY M. VEIX,
Plaintiff-Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORP.,
Defendant-Respondent.

ORDER DENYING MOTION TO AMEND OPINION AND REMITTITUR.

This matter being opened to the court by Fred G. Stickel, Jr., and Mulligan and Koenig, attorneys for the defendant-respondent in the presence of Walter P. Reilly and James L. Handford, attorneys for the plaintiff-appellant, on motion in behalf of the defendant respondent, to revise or supplement the opinion and remittitur in the above-entitled cause, and the court having heard arguments of counsel, and having considered the matter:

It is on this seventh day of February, 1940, ORDERED that the said motion be and the same is hereby denied.

LUTHER A. CAMPBELL,
C & P. J.

Endorsed: "Filed Feb. 7, 1940. Thomas A. Mathis, Clerk."

to the intent and purposes of the decision of the Court of Errors and Appeals, it has been repeatedly held, as in the above cited cases, by the Supreme Court of the United States in reviewing judgments of the highest court of a State that it is not limited to the opinion, but may examine and determine what is the real substance and effect of the decision.

II.

The Statute of Limitations cannot be interposed as a defense against appellant's rights to sue and recover under his contract.

The appellee cannot now urge a defense to appellant's action in this Court when it does not appear from the Record that it has availed itself of the affirmative defense of the Statute of Limitations, as it attempts to do on page 8 of its brief.

If the appellee had urged as a special defense the Statute of Limitations, it would be of no avail for the following reason:

The Certificates (R. 10 A—10 B) issued by the appellee to appellant recites that they were signed: "In Witness Whereof, the President and Secretary have hereunto attached their respective signatures and caused the seal of the Association to be affixed at Newark, N. J., * * *". Although the photostats of the Certificates do not clearly reproduce the impressions of the Corporate Seal contained on the originals, the latter will be lodged with the Clerk of this Court for inspection, if necessary.

These Certificates are sealed instruments for the payment of money, and therefore the Statute of Limitations in respect thereto would not bar appellant's right to sue and recover in accordance with his contract (R. S. 2:24-5).

In construing the source of the above section of the revision, the case of *Smythe* v. *Inhabitants of New Providence Township*, 253 Federal Reporter 824, the Court said at page 831:

> "Section 1 limits actions to 6 years and section 6, to 16 years. The former embraces actions founded on contracts 'without specialty', as did the original act of James I, and the latter actions, among others 'upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only'. While the quoted clause of the last mentioned section does not in so many words refer to instruments under seal, **the courts of New Jersey have given to the terms used their well recognized legal significance and have construed that clause to cover actions 'upon sealed instruments for the payment of money only'.** *Elsasser* v. *Haines*, 52 N. J. Law 10, 22, 18 Atl. 1095, 1100."

Therefore, the Statute of Limitations is not a sound defense for the appellee.

III.

The withdrawal right is an integral part of appellant's contract and not a mere privilege.

On pages 29 to 33 of Appellees' Brief it again attempts to establish the fallacious theory that the power to withdraw is but a "Statutory Privilege". In doing so it ad-

vances the novel notion that the withdrawal right is a separate and distinct right from the original contract. As a matter of fact the power to withdraw, and to recover his investment was a vital part of the appellant's contract in 1928 and 1929, when he paid in full for his shares. He would not have invested his moneys but for the Association's agreement to repay it on thirty days' notice. The cases decided by this Honorable Court, cited by the appellee on pages 29 to 33 of its brief do not bear out its contention. They deal with such rights as, shortening of the Statute of Limitation, distinction between a judgment and a contract, the right to recover compensation arising because of condemnation proceedings; the right to demand interest upon a judgment. We concede that none of these involve contract obligations.

The case of *Morley* vs. *Railway Co.*, 146 U. S. 162 cited by the appellee at page 32 of its brief points out the distinction. Although interest on a judgment is not a contract right, nevertheless interest on a principal sum may be stipulated for in the contract itself and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution.

At page 19 of the Appellee's Brief and on page 8 of Brief of the State of New Jersey, both cite the case of *Intiso* vs. *Metropolitan Savings and Loan Association*, 68 N. J. L. 588. This old case, far from showing that withdrawals were unknown to the common law, discloses that the right to withdraw now is and always has been a contractual right which cannot be divested by subsequent legislation. If there is no statute regulating withdrawals, then

we must look to the original contract made by the shareholder when he originally took his shares to determine his withdrawal rights. If at that time there be a withdrawal statute, that statute becomes an integral part of his contract, and his contract as a whole cannot be impaired by subsequent legislation. Applying this to the facts in the *Intiso* case, we find that when he subscribed for his shares on June 1, 1898, there was no withdrawal statute. His contractual right to withdraw therefor necessarily was contained in the Constitution of the Association, as it was composed on June 1, 1898. That instrument permitted him to withdraw his shares on 60 days notice with interest at 4% less a withdrawal fee of a $1.00 per share, and further provided that no more than 50% of the dues received in any month should be applicable to the payment of withdrawals. A subsequent statute of 1899 made no provision for a withdrawal fee such as had been provided in the constitution of the association when Intiso became a member. The court said at page 590:

> "In becoming a member of the Metropolitan Savings and Loan Association, Intiso agreed to the condition imposed on withdrawal of shares. It is not competent for the legislature to impair the obligation of that contract."

It follows therefore that the basis of the right of withdrawal now is and always has been contractual. When there was no withdrawal statute, if the Constittuion and By Laws of the Association and the stock certificate did not give the shareholder any right to withdraw, then he must remain a member and pay his dues until maturity or forfeit all the moneys that he had paid in.

This is the "public scandal" alluded to by the appellee on page 16 of his Motion to Dismiss.

Therefore in 1899 the New Jersey Legislature attempted to regulate withdrawals by statute. This statute was for the protection of the shareholder, it prevented a withholding and a forfeiture of the shareholder's instalments by an unscrupulous association. So does the 1925 Act.

The first statute regarding withdrawals was the 1899 Act mentioned in the *Intiso* case *supra*. This Statute was held not to be applicable to contracts made prior to its enactment but as to contracts made subsequent thereto, the statute had to be read into the contract and became an integral part of it. Therefore, at any particular time, we have to examine the contract, which includes the Constitution and by-laws of the Association, the Stock Certificate of the member and the withdrawal Statute, in existence at the time the contract was made.

We have mentioned the situation as it stood in the *Intiso* case. When the shares were issued the contract consisted solely of the Constitution, By-Laws and Stock Certificate. Subsequent New Jersey Legislation was not permitted to impair that contract.

It might be noted here that the Constitution of the Association prior to the 1899 Act in the *Intiso* case provided that not more than one-half of the dues should be applicable to the payment of withdrawal. The 1899 Act, page 357, contains a similar provision.

That Association need not pay more than 50% of its income on withdrawals, whether the contract was made with the Metropolitan Savings and Loan Association prior to the Act of 1899, or while that act was in effect.

After 1899 the legislature of New Jersey enacted various withdrawal statutes until we reach P. L. 1925 Chapter 65. Just like the previous cases, every shareholders' rights are governed by the terms of the Constitution and By-Laws of the Association, by his stock certificate and by the statute as it existed when the contract was made.

In 1928 and 1929, when the appellant made his contract, Section 52 P. L. 1925, became an integral part of it. That statute is quite different from the statute mentioned in the *Intiso* case. Not only did it require the association to apply at least 50% of its income to the payment of withdrawals, but it gave the shareholder a further right. **It did not limit him to a particular fund but gave him a right to sue for and recover the withdrawal value of his shares if he was not paid within six months from the date of the withdrawal notice.** That was an integral and vital part of his contract which could not be impaired by subsequent legislation.

The situation now before this Court is quite similar to the case of *Sautter* vs. *Supreme Conclave Improved Order of Heptasophs*, 76 N. J. L. 763, decided by the New Jersey Court of Errors and Appeals. In this case when the assured became a member of the association his application for membership was subject to the By-Laws then in existence, or that might be thereafter adopted, and his contract further provided that the association would pay $1,000 to his widow—within sixty days from the receipt of satisfactory proof of his death. After the date of his contract and before his death the By-Laws were amended to provide no benefit for a member who should commit suicide. The defendant's answer to a suit on the contract was

that the member had died by suicide. On demurrer to the answer on the ground that it did not set out a bar to the plaintiff's right to recover the court said, page 765.

> "The certificate was a contract of a definite character and conferred a vested right upon the beneficiary and upon the member a property right."

The court held that the contract dated from the time of membership, and not from the date of the death or from the date of the receipt of satisfactory proof of death, and gave judgment accordingly. Likewise in the case at bar the rights of the plaintiff regarding withdrawal were vested from the date when appellant became a member of the Association, and his vested contract rights could not be changed or altered by subsequent legislation.

IV.

Chapter 102 P. L. 1932 impairs appellant's vested contract rights and his vested property rights.

What we have said in our main brief regarding the unconstitutionality of 1937 New Jersey Revised Statutes 17: 12-53, applies also to Chapter 102 of the Laws of 1932. The State of New Jersey in its brief *amicus curiae* filed in this cause at page 6 tabulates the changes in very convenient form.

They are:

1. The 1932 definition of monthly receipts limits funds applicable for payment of withdrawals.

2. The provision in the 1925 Act that in no case shall payment be postponed for a period longer than six months is eliminated by the 1932 act.

3. The provision in the 1925 act that a withdrawing member may sue for and recover the withdrawal value of his shares if the same is not paid in six months is eliminated by the 1932 act.

4. The 1932 act establishes a withdrawal list with payment, out of 50% of the receipts, to be made $500 to each member in rotation.

5. The 1932 Act prohibits all withdrawals by prepaid shareholders so long as funds available are insufficient to pay all matured shares.

6. The 1932 act prohibits suit by a withdrawing shareholder so long as funds are disbursed as in that act directed.

It is respectfully submitted that these changes, as stated in *Buesi* vs. *Longworth Building and Loan Association*, 119 N. J. L. 120, do impair the appellant's vested contract rights and his vested property rights. Our argument is contained in our main brief under the Points II, III and IV to which we beg leave to refer, and we must add that by the 1932 act as by R. S. 17:12-53 the payment of matured shares have a preferential right over payment of prepaid shares.

V.

Chapter 65 P. L. 1925, in so far as applied to appellant, did not make him an equal participant with all the other members.

Appellee fallaciously asserts many times through its brief, and so does the brief in behalf of the State of New Jersey, that there is a certain "equality, equity and mutuality" between all shareholders of a building and loan association. It is respectfully submitted that this is not so. Each member's contract must be examined to determine his individual rights.

The appellant is not an instalment shareholder. He is a prepaid shareholder. He has been a matured shareholder from the day he invested his money. He is limited to a fixed interest rate of six per centum per annum. He does not share in the general profits of the association. There is no mutuality, or equality between him and the instalment shareholders. This is very ably stated in the recent case of *Cohen v. Swink*, 3 S. E. 2nd 471; 476 (Va.) in the following language:

> "When the differences in their contractual relations are noted, the application of the 'supreme rule of equality and mutuality' would be abortive of the principle and it would be destructive of itself. Equality, as equity perceives it cannot be had by taking the rights which one has, for the benefit of another who is not entitled to enjoy them. Equality without justice is non-existent."

It is this attempt to make all shareholders equal, who are not equal, which was condemned by this Honorable Court in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, in these words: "* * * they do alter the rights of withdrawing members as between themselves and as against continuing members. * * * They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain."

Conclusion.

It is respectfully submitted that the judgments of the New Jersey Court of Errors and Appeals and of the New Jersey Supreme Court should be reversed; New Jersey 1937 Revised Statutes 17:12-53 and its various sources from 1932 to its enactment should be declared unconstitutional, and since this situation has existed already in New Jersey for nearly eight years, that judgment be now entered in this Court in favor of the appellant in accordance with his original complaint.

WALTER P. REILLY,
JAMES L. HANDFORD,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

GEORGE D. MULLIGAN,
Counsel for Appellee.

WILLIAM F. DELANEY,
Of Counsel.

INDEX.

Subject Index.

Page

Statement opposing jurisdiction and motion to dismiss 1

Table of Cases Cited.

Bettle v. *Republic Savings and Loan Association*, 64 Atl. 176 17

Bucsi v. *Longworth Building & Loan Association*, 119 N. J. L. 120 14

Cunningham v. *Mutual Building & Loan Association*, 72 N. J. L. 172 17

Fitzgerald v. *State Mutual Building & Loan Association*, 76 N. J. Eq. 137 18

Fornatoro v. *Atlantic Coast Building & Loan Association*, 10 N. J. Misc. Reports 1248, 163 Atl. 240 20

Horowitz v. *Guarantee Building & Loan Association*, 2 Mercer Beasley Review 192 21

Pierce v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316 15

Rocker v. *Cardinal Building & Loan Association*, 13 N. J. Misc. Reports, 397, 119 N. J. L. 134 ..... 14, 21

Sommer v. *Workingmen's Building & Loan Association*, 8 Atl. (2d) 229 23

Thirteenth Ward B. & L. Association v. *Weissberg*, 115 N. J. Equity 487 22

Treigle v. *Acme Homestead Association*, 297 U. S. 189, 56 Sup. Ct. Rep. 408, 80 L. Ed. 391 23

Statutes Cited.

Endlich on Building Associations, 82, 83 22

Pamphlet Laws of New Jersey, 1898, page 199 16

Pamphlet Laws of New Jersey, 1899, page 357 ..... 17, 24

Pamphlet Laws of New Jersey, 1903, page 457 16

Pamphlet Laws of New Jersey, 1903, page 459, Section 5 18

Page

Pamphlet Laws of New Jersey, 1903, page 476, Section 53 18
Pamphlet Laws of New Jersey, 1925, Chapter 65, Section 49 ..... 2, 6
Pamphlet Laws of New Jersey, 1925, Chapter 65, Section 52 ..... 3, 7
Pamphlet Laws of New Jersey, 1932, Chapter 90, page 159 23
Pamphlet Laws of New Jersey, 1932, Chapter 102, ... 2, 4, 13, 14, 24
Revised Statutes of New Jersey, 1937, 17 : 12-49 ..... 5, 8
Revised Statutes of New Jersey, 1937, 17 : 12-53 ..... 2, 8, 14, 15
Revised Statutes of New Jersey, 1937, Chapter 188 5
Warren-History of Building and Loan Associations 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION,

Appellee

ON PETITION FOR APPEAL.

STATEMENT OF MATTER OR GROUND MAKING AGAINST THAT JURISDICTION OF THIS COURT ASSERTED BY THE APPELLANT AND MOTION BY APPELLEE TO DISMISS

The Sixth Ward Building & Loan Association of Newark, New Jersey, a corporation of the State of New Jersey, the above-named appellee, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States makes this statement disclosing the matter and

grounds making against that jurisdiction of this Court asserted by the above-named appellant.

In the statement filed pursuant to Rule 12 of the Supreme Court of the United States by the Appellant in this cause and in its Assignments of Error it erroneously alleges that the New Jersey Court of Errors and Appeals erred in failing to hold that 1937, Revised Statutes of New Jersey, 17: 12-53, was unconstitutional and in holding that it was constitutional in that the New Jersey Court of Errors and Appeals, in fact, did not consider the said act at all and made no decision as to its constitutionality or unconstitutionality but on the contrary the issue submitted to it by appellant and appellee and considered and decided by said Court was the constitutionality of Chapter 102, Pamphlet Laws 1932 being an amendment of Chapter 65, Pamphlet Laws 1925. Hence this Court is being asked to review an alleged decision of the New Jersey Court of Errors and Appeals, which in fact, was never made.

The appellant became a member of the appellee Building and Loan Association on October 1, 1928 and at that time the Act governing Building and Loans of New Jersey was "An Act concerning Building and Loan Associations, Revision of 1925", Chapter 65, Pamphlet Laws of 1925.

The sections relating to withdrawal being sections 49 and 52 were as follows:

> SECTION 49—"The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value;

in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

SECTION 52—"Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

These two sections are set up in the complaint filed by the appellant in the New Jersey Supreme Court as part of paragraph 3 of such complaint.

On August 17, 1932 the appellant gave to the appellee notice of his desire to withdraw said shares and at that time the said Revision of 1925 had been amended, so far as Section 52 is concerned, (49 remaining the same), so that Section 52 then read as follows:

SECTION 52—"Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by para-

graphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one month the funds of the associations required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

See Chapter 102, Pamphlet Laws 1932.

The appellant instituted suit against the appellee on the Twenty-fourth day of March, 1939, at which time the statute governing Building and Loan Associations as far as with-

drawals are concerned, was Revised Statutes, 1937, 17:12-49 which reads as follows:

> "*Withdrawal of shares.* The shares of every building and loan association of this State, or doing business herein, may be withdrawn by the holder upon giving such written notice, not exceeding thirty days, as its constitution provides. Upon withdrawal of such shares a reasonable portion of the dividends or profits, if any, credited to such shares may be retained by such association and the remainder of the amounts credited on such shares, less fines and other obligations thereon, paid to the withdrawing member in the manner otherwise provided in this chapter, but no fines shall be deducted from the dues credited on shares which shall be withdrawn within one year after such shares shall have been subscribed. This section shall not be construed to prevent a reduction of the share liability of any such association to its members for the purpose of providing for losses or anticipated losses or of reserving against them as otherwise provided in this chapter. The commissioner, if it appears to him that the association is in an unliquid condition, may authorize the making of a written agreement, which shall be binding on assenting members of the association, whereby the assenting members shall agree not to file a notice of withdrawal before a date specified in the agreement. Notice of the agreement shall be printed or stamped upon the face of the certificate or pass book, or both, of each assenting member when the certificate or pass book comes into the possession of the association."

And 17:12-53 which is quoted in full on pages 3-5 of appellant's statement.

These Revised Statutes constituted a new enactment of law by the Legislature of 1937 and not a mere revision and such Revised Statutes were approved December 20, 1927 and became Chapter 188, Laws 1937.

The complaint filed by the appellant is as follows:

COMPLAINT

NEW JERSEY SUPREME COURT, ESSEX COUNTY.

HARRY M. VEIX,

Plaintiff,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION,

Defendant.

Action at Law, Complaint.

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT

1. On October 1, 1928, plaintiff purchased Twenty-five (25) Prepaid Shares of the Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each for which the plaintiff paid the defendant the sum of Five thousand dollars ($5,000.00).

2. By the terms thereof the defendant agreed to pay the plaintiff Six (6) per cent per annum interest on the face value of said shares.

3. At the time said shares "were purchased as aforesaid an act concerning Building and Loan Associations, Revision of 1925" being Pamph. L. 1925 C 65, was then in force which provided among other things as follows:

Section 49 provides as follows:

"49. How Withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the

holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

Section 52 of the Act provides as follows:

"52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

4. At the time said shares were purchased the Constitution of the defendant provided for withdrawal of prepaid certificates as follows:

Article XIX. Prepaid shares.

Section 2. Prepaid shares shall bear interest payable semi-annually on the First day of May and Novem-

ber of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any regular meeting of the Association.

5. On August 17, 1932, the plaintiff gave the defendant written notice of withdrawal of said shares.

6. Thirty days thereafter plaintiff demanded of defendant payment of the withdrawal value of his said stock and interest due thereon.

7. Six months thereafter and on many other occasions said plaintiff demanded of defendant payment of the withdrawal value of his stock and interest due thereon.

8. At the time of such demands defendant had sufficient funds in cash on hand to pay the same and now has sufficient funds in cash to pay the same.

9. At the time of such demands the defendant was and still is solvent.

10. Subsequent to August 17, 1932, the date of plaintiff's withdrawal notice payments had been made by defendant upon other withdrawal applications.

11. The defendant claims to be operating under New Jersey revised Statutes 17 : 12-49 also 17 : 12-50—Source L 1925, C 65, Sec. 49, p. 211 as amended by L. 1932, C 92 Sec 1, p. 161, L 1935, C 59 Section 10 p. 152. 17 : 12-53 Source L 1925. C. 65, Section 52 p. 212, as amended by L. 1932, C 102 Section 1 p. 175, L 1935 C 59 Section 11, p. 153, L. 1936, C. 118 Section 4, p. 295, but all of these statutes in so far as they might affect the plaintiff's right herein are unconstitutional and within the inhibitions of Article 4 Sec. 7 paragraph 3 of the Constitution of the State of New Jersey and of Article 1 Section 10, of the Constitution of the United States of America, and of Section 1 of the Fourteenth

Amendment of the Constitution of the United States of America and therefore are void insofar as the plaintiff's rights are concerned.

12. There are no legal assessments, deductions or reserves which can or should be withheld from the plaintiff and any attempt on the part of the defendant to withhold any part of the plaintiff's money under alleged color thereof or under alleged color of any order of the Commissioner of Banking and Insurance of the State of New Jersey is done in violation of Article 4, Section 7, Paragraph 3 of the Constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and is therefore void insofar as it may affect the right of the plaintiff herein.

13. There is due and owing from the defendant on said shares the sum of Five thousand dollars, together with interest from October 5, 1932, which sum has been demanded from the defendant, but payment has been refused.

Judgment will be claimed for Five thousand Dollars ($5,000.00) with interest at six per cent per annum from October 5, 1932 and costs of suit on the first count.

SECOND COUNT

1. On October 2, 1929 plaintiff purchased Seventeen and one-half (17½) Prepaid shares of The Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each, for which the plaintiff paid the defendant the sum of Three Thousand five hundred dollars ($3,500.00).

2. Plaintiff repeats the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and make them a part of this Count.

15. There is due and owing from the defendant the sum of Three thousand, five hundred dollars ($3,500.00) together with interest from October 5, 1932 which sum has been demanded from the defendant but payment has been refused.

Judgment will be claimed for the sum of Three thousand and five hundred dollars ($3,500.00) with interest at six per centum per annum from October 5, 1932 and costs of suit on the second count.

WALTER P. REILLY,
Attorney of Plaintiff,
790 Broad St.,
Newark, N. J.

ANSWER

(Filed April 24, 1939)

NEW JERSEY SUPREME COURT, ESSEX COUNTY

HARRY M. VEIX,

Plaintiff,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a Corporation,

Defendant

Action at Law

Answer

The Defendant, Sixth Ward Building and Loan Association of Newark, New Jersey, a corporation, reserving all manner of objection to the Complaint herein and the right to move to strike out said Complaint at or before trial on the ground that the same does not set forth a cause of action in either of any of the counts therein set forth, for answer thereto says:

FIRST COUNT

1. It admits the allegations in Paragraph 1.

2. It denies the allegations in Paragraph 2.

3. It neither admits nor denies the allegations contained in Paragraph 3 and conceives and alleges that they are argumentative and improperly alleged.

4. It admits that its constitution contained the provision "Article XIX, Prepaid Shares" as set forth in Paragraph 4.

5. It admits the allegations in Paragraph 5.

6. It has no information nor knowledge of the truth of the allegations contained in Paragraph 6 and therefore neither admits nor denies the same.

7. It has no information nor knowledge of the truth of the allegations contained in Paragraph 7 and therefore neither admits nor denies the same.

8. It denies the allegations contained in Paragraph 8.

9. It admits the allegations contained in Paragraph 9.

10. It admits the allegations contained in Paragraph 10.

11. It does not answer the allegations contained in paragraph 11 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

12. It does not answer the allegations contained in paragraph 12 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

13. It denies the allegations contained in Paragraph 13.

SECOND COUNT.

1. It admits the allegations contained in Paragraph 1 of the Second Count.

2. It repeats the allegations contained in the Answer to Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and makes them a part hereof.

13. It denies the allegations contained in Paragraph 13 of the Second Count.

First Separate Defense.

The plaintiff is barred from bringing the said suit against the Defendant by the provisions of Revised Statutes of New Jersey, 1937—17:12-53 as follows:

"No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; * * *"

MULLIGAN & KOENIG,
Attorneys for Defendant.

Thereupon the appellant-plaintiff, moved to strike the answer of the appellee-defendant, and the appellee-defendant moved to strike the complaint of the appellant-plaintiff, each contending that the pleading moved against did not set forth a defense or cause of action.

Thereupon, on the Twenty-eighth day of April, 1939, the New Jersey Supreme Court, through Edwin C. Caffrey, Circuit Court Judge acting as Supreme Court Commissioner, "ordered that the said complaint be stricken out on the ground that it discloses no cause of action" and pursuant thereto on May 2, 1937, judgment was entered in favor of the defendant and against the plaintiff, costs of the defendant to be taxed.

Appeal having been taken to the Court of Errors and Appeals, the issue, argued and submitted to the Court was whether the Act of 1925 as it stood when the plaintiff became a member, should apply or whether the Act of 1925 as amended by Pamphlet Laws, 1932, Chapter 102, the Act in effect when the plaintiff applied for withdrawal should govern and if so whether it was constitutional. The Court of Errors and Appeals determined that the Act of 1932 should apply and that it was constitutional and having made that decision it did not find it necessary to consider other defenses raised by the appellee's answer. Hence the only Federal question in issue is as to the constitutionality of Chapter 102 of Pamphlet Laws 1932 and its applicability to

the instant litigation, and Revised Statutes 1937, 17: 12-53 was not passed upon by the Court or submitted for consideration by the parties.

The Court of Errors and Appeals conceived that this case was governed by its ruling in *Bucsi* v. *Longworth Building & Loan Association*, 119 N. J. L. 120 and *Rocker* v. *Cardinal Building & Loan Association*, 119 N. J. L. 134, copy of which opinions are attached to the appellant's statement filed in this Court and from which it will appear that the Pamphlet Laws 1932, Chapter 102 was the only Act considered by the New Jersey Court and from which it will further appear that these cases were submitted at the May Term, 1935 of the New Jersey Court of Errors and Appeals and decided October 26, 1937, all before the Revised Statutes of 1937 had been enacted.

Thus, even if the United States Supreme Court should declare the Act of 1937 unconstitutional or uphold its constitutionality it would have no bearing or effect whatsoever on the judgment below.

The appellant quoted Revised Statutes 1937, 17:12-53 in its statement filed in this Court and a comparison of that Act with the Pamphlet Laws 1932, Chapter 102 will reveal a marked difference in substance.

Indeed, a comparison of the Act of 1932 with the Act of 1925 as it stood when the appellant acquired his membership and when that 1925 Act is read in the light of its legislative history and the decisions of the State of New Jersey as hereinafter developed will reveal little if any change in substance between the privilege of withdrawal as given by the laws of 1932 and that practically in effect under the Laws of 1925, as they existed when the appellant acquired membership.

On the other hand, a comparison of the act of 1925 as in effect when the appellant acquired membership, with Re-

vised Statutes 1937, 17: 12-53 will show a rather marked difference between the philosophy involved in the transaction of withdrawal and in the percentage allocated to withdrawing members.

Moreover, it is to be observed that no opinion upon the motions addressed to the respective pleadings was rendered by the trial court, and while in the Court of Errors and Appeals the Court expressed the view that Pamphlet Laws 1932, Chapter 102 applied and governed the situation and held that Act constitutional, it is a fact that the action of the lower Court and the affirmance by the upper Court can be sustained for reasons that do not involve the constitutionality of the said Act of 1932. In other words, the action of the Court of Errors and Appeals in affirming the Court below in striking the complaint as not setting forth a cause of action can be sustained on a non-federal ground and therefore as we understand the decisions of the United States Supreme Court it will not take jurisdiction or allow an appeal under such circumstances.

(See *Pierce* v. *Somerset Railway*, 171 U. S. 641—43, L. Ed. 316 at page 319 and cases there cited).

The earliest type of Building and Loan Association did not permit a member to withdraw; withdrawal involved forfeiture of the investment. Later a privilege of withdrawal was conferred by the constitution of the various associations, thus leaving the shareholder at the mercy of management as to the extent and terms of withdrawal. Thus one association might allow a percentage of profits on withdrawal, another might deny such right, while still a third might actually retain a part of the money paid in and competition apparently would constitute the only or chief reason for generous or reverse treatment of a shareholder. It is reasonably safe to say that this situation as to withdrawals was at least partially the cause of the condition existent

prior to 1903 which justified the Court in *the Busci* case, in its statement that "it is a matter of such common knowledge as to require judicial notice that the operation of Building and Loan Associations in this State during the latter part of the last century had been so loose and utterly devoid of any consideration of the purpose for which they were created and the rights of the subscribing members that the situation was a public scandal and called for action on the part of our legislature."

To this situation the legislature addressed itself by the enactment of the first general building and loan act that of 1903, Pamphlet Laws 1903 page 457, as to which the Court in the *Busci* case at page 124 said:

> "The need of regulation in the public interest was obvious and the statute was enacted for the protection of the public savings under the inherent police power of the state."

Beginning about 1894 at which time there appears to have been some legislative investigation of the State and National Building & Loan Associations then in existence and still later when apparently another committee appointed by the assembly of New Jersey began to investigate the then building and loan conditions, see pamphlet laws 1898—199, the Associations came in for considerable criticism some of which appears in the annual reports of the Bureau of Labor and Industries on file in the New Jersey State Library, some in the reports of the Department of Banking and Insurance after it took over the supervision of the Associations in about 1899 and much of which is found in newspaper reports of meetings of the building and loan leagues and other meetings and in periodicals, a large part of which has been excerpted by Mr. John Warren in his History of Building and Loan Associations in the United States and his briefs which history and briefs were before the Court of Errors and Ap-

peals in the *Bucsi* and *Rocker* cases. Such investigations and such criticism undoubtedly in part formed the inspiration for the Act of 1903 as well as the earlier Act of 1899 page 357; which latter Act for the first time conferred the statutory privilege of withdrawal upon instalment shareholders and the amount that should be returned to such shareholders upon withdrawal. However, even this Act did not confer such privilege of withdrawal upon the paid up or full paid shareholder now known as the income shareholder. Under the earlier Act it had also been held that upon the maturity of shares in a building and loan association that is when the payments on said shares plus the profits had reached a mathematical value equal to the par of the shares, the shareholder became a creditor entitled to receive his money provided the funds arising from the appropriation of one-half of the receipts of the Association should be sufficient for such purposes—*Cunningham* v. *Mutual Building & Loan Association*, 72 N. J. L. 172-180.

It had also been held in the case of *Bettle* v. *Republic Savings and Loan Association*, 64 Atl. 176, that under the said Act of 1875 there was no authority for the issuance of income stock.

The Act of 1903 proceeded to confer the privilege of withdrawal upon paid up or full paid shareholders as well as upon instalment shareholders and to better fix the return to be made to withdrawing shareholders and such privilege of withdrawal is identical with that in existence under the revision of 1925 when the appellant became a member of the appellee Association. The Act also conferred the right to issue full paid shares carrying a fixed dividend in lieu of participation in the unfixed or general profits or paper profits of the Association but distinctly stated that no preferred shares could be issued and no shares other than common shares issued. It further provided that a member remained a member until paid thereby eliminating the effect

of the decision in the *Cunningham* case. See Pamphlet Laws 1903, page 459, Sec. 5. It further provided that all shareholders should occupy the same relative status as to debts and losses of the Association, Pamphlet Laws 1903, page 476, Sec. 53.

It thus is easy to see why the Court in *Fitzgerald v. State Mutual Building & Loan Association*, 76 N. J. Eq. 137 at 143, says "The general building and loan association Act of 1903 of which the sections already referred to touching withdrawals form a part will be found to contemplate throughout its provisions the central idea of co-operation, equality and mutuality upon the part of the members of the Association" and why it held that upon insolvency the holders of shares on which notice of withdrawal had been given are entitled to no preferment. Indeed, it is well settled that the privilege of withdrawal may only be exercised while an association is solvent since otherwise preference and discrimination must result.

Despite this legislative history the appellant contends that an unpaid withdrawing shareholder after six months is entitled as of right to sue his fellow members as represented by the Association and to take judgment with its consequent lien, preference and disruption. In other words, the appellant contends that the pendulum has swung from no privilege of withdrawal whatsoever and forfeiture upon withdrawal, to a situation where the withdrawing or terminating member has rights through which for his own benefit he may wreck the common enterprise and impair the rights of his fellow members. That the legislature could do this if it so desired we do not deny but we do say that before any such destructive result is arrived at it must appear plainly and clearly that the language expresses such legislative intention. The law as it stood when the appellant became a member is not so clear as to deny judicial con-

struction. The language is ambiguous and cries out for judicial construction.

We submit that the proper construction to be placed upon the withdrawal provisions as they stood in 1928 when the appellant became a member of the Building and Loan Association is that during the first six months after withdrawal no more than one half of the net receipts of the Association are applicable to the payment of withdrawing members although in its discretion the management may apply a greater percentage. After six months the management must apply in excess of one-half of such receipts but the Act is silent as to how much more than such one-half must be so applied. This silence speaks loudly for it indicates that the legislature contemplated that management would determine how much more than one half would be applied having in mind the interest of other shareholders including those able to carry on and having in mind the rights of creditors and having in mind the future of the Association as a whole. It was not the intent of the legislature to adopt a rigid rule but to prescribe an elastic remedy realizing that no legislation could rigidly govern every conceivable situation that might arise in every Association. The legislature never intended that after six months non payment of withdrawals every Association regardless of its condition must pay every withdrawing shareholder in full under penalty of suit. But it may be said that the legislature declares that the withdrawing shareholder may sue the Association, what does that mean? It means just this, that if in the exercise of that discretion which the legislature confers upon management after six months has elapsed the management exercises it capriciously or unreasonably and being able to pay a withdrawing shareholder in whole or in part without undue injury to his fellow members or the Association refuses to so pay or allocate the withdrawing member may sue. He has his

remedy and the Court upon such application will determine and adjust the equities. We think the proper remedy is by mandamus to enforce, in the discretion of the Court appealed to, the doing of justice. We do not think the right to sue given contemplates a suit as for debt particularly when the statute itself provides in effect that a member remains a member until paid and when the *Cunningham* case which made a maturing shareholder a creditor was in fact repealed by the 1903 Act. The legislature never intended by the language of this clause to determine everything to create a finality. It left to the Courts and management the working out of the many problems that would arise in the face of existing facts and circumstances.

As a matter of fact considering that the privilege of withdrawal only applies where an Association is solvent is it not apparent that so far as the Acts of 1903 and 1925 are concerned that up to 1932 the legislature had not undertaken expressly to legislate as to what the situation should be where the number of withdrawals on file were such that the Association could not pay all at one time. Pamphlet Laws 1932, Chapter 102, for the first time expressly legislated that where an Association could not pay all of its withdrawals it must pay them in a certain way and manner and by the allocation of one-half of the net receipts and as long as it did that it could not be sued.

We submit that this express legislation is nothing more or less than the proper interpretation of the Act of 1925 and that that which the legislature in 1932 laid down as a policy is the confirmation of the policy to be implied by a proper construction of the Act of 1925.

In *Fornatoro* v. *Atlantic Coast Building & Loan Association*, 10 N. J. Misc. Reports 1248, 163 Atl. 240, the Court in effect held that the transaction of withdrawal is a privilege, a legislative or statutory privilege and not a right and that a withdrawing member does not acquire the status of

a creditor by virtue of his notice of withdrawal. See also the illuminating opinion of Judge Cleary, Circuit Court Judge acting as Supreme Court Commissioner in *Rocker* v. *Cardinal Building & Loan Association*, 13 N. J. Misc. Reports 397.

In *Horowitz* v. *Guarantee Building & Loan Association* (an unreported case in one of our Circuit Courts abstracted 2 Mercer Beasley Review 192-201) the plaintiff a withdrawing shareholder brought suit against the Association more than ~~six months~~ after notice of his claim had been filed. Sec. 52 of the revision of 1925 was then in force and there was no allegation that the defendant Association was in possession of funds legally applicable to the plaintiff's claim for the withdrawal of his shares. The defendant moved to strike the complaint on the ground that it did not set forth a cause of action. The court sustained the motion and struck the complaint.

We submit that this is the law of the State of New Jersey and that a plaintiff bringing suit under section 52 of the Revision of 1925, assuming that mandamus is not the proper remedy, must allege and prove that at the time of the application for withdrawal the Association was in possession of sufficient net receipts or perhaps even of principal or corpus which could with safety to the Association and in justice to the other members of the Association be applied to the payment of the withdrawing shareholder instituting suit.

To adopt the construction contended for by the appellant would be to exalt the member who having embarked upon the enterprise falls by the wayside and desires to withdraw and to exalt him over that member who patiently and ploddingly continues his savings and is prepared so to do to maturity, not to speak of the borrowing member who can only acquire a debt free home if his fellow members continue their savings and keep the enterprise solvent.

As the Court of Errors and Appeals said in *Thirteenth Ward B. & L. Association* v. *Weissberg*, 115 N. J. Equity 487, page 493, "The right to withdraw without the forfeiture of the money paid in is in its essence a privilege. In becoming a member of the Association the shareholder does so ostensibly, at least with the purpose of remaining in it to the end, bearing his part of all its burdens and finally sharing all its profits in the same proportion. His failure to continue in the concern therefore is essentially in the nature of a breach of contract, upon which the loss of his previous contribution might, nor unreasonably, be held to follow. But circumstances unforeseen at the time of his assumption of membership, may, without any wrong on his part, make a severance of his connection with the association desirable, if not imperative. Endlich on Building Associations, 82, 83.

If appellant's contention is sound the power of withdrawal is much more than a privilege; it is a right, after six months, to wreck the Association if the withdrawing shareholder is not paid. Incidentally, in the *Thirteenth Ward B. & L. Association* case just cited the Court held that a shareholder in a building and loan association does not acquire a vested right to the profits apportioned to his share at the annual meeting of shareholders, that apportioned profits pending maturity are paper profits, unfixed profits which do not become complete until maturity is attained. And yet if the appellant is correct after a six months wait a withdrawing shareholder must receive not only what he paid in but a reasonable share of such profits and failing such payments may reduce his claim to judgment and place it upon an apparent parity with bank or other general creditors. This statute certainly does not permit of any such construction.

We have alluded to the fact that by the Act of 1903 a member remained a member until paid and that policy is reflected in the Revision of 1925 and also in the amendment

to such Revision adopted in 1932 as well as in all later legislation. Chapter 90 Laws 1932 page 159. So also the later Acts, Revision of 1925 and the amendments thereto and the Revised Statutes of 1937 all contain provisions in the interest of equality, co-operation and mutuality, even to a greater extent than those in the Act of 1903 which justified the comment of Vice Chancellor Leaming in the *Fitzgerald* case heretofore set forth. And in the case of *Sommer* v. *Workingmen's Building & Loan Association*, 8 Atlantic Reporter 2nd 229, one of our trial courts held that under our legislation a member remains a member until paid and that the *Cunningham* case hereinbefore cited has been repealed by the subsequent building and loan legislation.

Nor is the decision of the Supreme Court of the United States in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189-56, Supreme Court Reports 408-80, L. Ed. 391, one in which the Court held a comparable statute of Louisiana unconstitutional as impairing the obligation of contracts and destroying vested rights as alleged by the appellant in his statement. The facts in this case are quite different from those under consideration in the *Treigle* case. In the *Treigle* case the shareholder applied to withdraw under the Act which was in effect when he became a member and thus his potential right of withdrawal had fruitioned into a vested right prior to the passage of the legislation then under review in the United States Supreme Court. Sometime after his rights had thus vested the legislature of Louisiana sought to so far change such vested rights as to place within the discretion of the management of the shareholder's association when and how much and what the shareholder should receive on withdrawal.

In the instant case that is not the situation. Appellant became a member under the Revision of 1925 and he did not apply to withdraw, that is, his potential statutory privilege

of withdrawal did not fruition into a vested right as the result of exercising such privilege, until several months after the legislature which had conferred the statutory privilege had elected to change it. Therefore, the *Treigle* case is not dispositive of the situation here even if only a Federal question is involved. Nor is there in fact an impairment of contract as alleged by the appellant assuming the applicability of the *Treigle* case. This is said because upon a comparison of the amendment, Pamphlet Law 1932, Chapter 102 with the Revision of 1925 as it stood when appellant became a member, it will be seen that there is no substantial difference between the privileges under the two acts when the Act of 1925 is read and construed in the light of the legislative history of the Act and in the light of the principle of equality and co-operation which are fundamentals of the building and loan movement. The only difference is that the 1932 Act expressly sets forth the procedure to be followed where the receipts of the Association are insufficient to pay all withdrawing shareholders without producing preference and discrimination, while the Revision of 1925 refers it to management to work out equity and justice among withdrawing and continuing shareholders subject to the power of the court to adjust the equities in the event of capricious and unreasonable conduct on the part of the management.

It must never be overlooked that while prior to 1899 the power of withdrawal was purely contractural and the shareholder subject to the control of management in such respect, the legislature in 1899 adopted a policy which removed this power from the realm of the contractural and placed it upon the basis of a statutory privilege, with which management could not interfere and which could only be changed by the legislature appellant took subject to this legislative policy. And finally it is to be observed that

although the application for withdrawal was made in August of 1932 it was not until March of 1939 that suit was instituted and since the rights of other shareholders and of the Association itself have been changed during that period and since while the appellant was silent and did nothing after applying for relief under the new amendment the Association and his fellow members have proceeded to operate and stay in business under and by virtue of the Act of 1932 the appellant cannot claim an impairment of contract at this late day.

We respectfully submit because of the foregoing grounds and matters that this Court has no jurisdiction of the appeal or at least should not take jurisdiction of this appeal and respectfully move to dismiss such appeal because of such grounds and matters.

Respectfully submitted,

GEORGE D. MULLIGAN,
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Counsel for Appellee.

(Filed Nov. 17, 1939.)

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION, a corporation,

Appellee.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF ON BEHALF OF APPELLEE.

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INDEX.

	PAGE
Preliminary Statement	1
The Court of Errors and Appeals of New Jersey Only Passed Upon and Decided the Constitutionality of P. L. 1932, Chapter 102, and Did not Pass Upon and Decide the Constitutionality of R. S. 1937—17:12-53	4
Summary	9
The Power of a Building and Loan Shareholder to Withdraw From His Association Is Determined by the Statutes Regulating Withdrawal in Effect When the Application Is Made and Not by the Statutes in Effect When Membership is Acquired	11
But in Any Event the Regulation of 1925, Sections 49 and 52, Chapter 65, Laws 1925, Is a Mere Statutory Privilege or Simply Procedural in Character	29
Nevertheless, Even if the Power Is Contractual and Vested It Is Subject to Modification in the Proper Exercise of the Police Power of the State, and P. L. 1932, Chapter 102, Was a Proper Exercise of that Power	33
Moreover, Appellant's Membership Contract Was Not Impaired	39

Table of Cases Cited.

PAGE

Acklin vs. *Peoples Savings Association*, 293 Fed. 392 12
Adams vs. *Union National S. & L. Association*, 55 Ind. A. 676, 100 N. E. 389, 102 N. E. 145 ..... 18, 31
Agnew vs. *Macomb Building & Loan Association*, 64 N. E. 260 20

Bank of Oxford vs. *Love*, 250 U. S. 603, 40 S. Ct. 22, 64 L. ed. 1165 33
Beardon vs. *Peoples Building & Loan Association*, 49 S. W. (Tenn.) 64 18
Bedford vs. *Eastern Building & Loan Association*, 181 U. S. 227 22
Bertche vs. *Equitable L. & I. Co.*, 147 Mo. 434, 48 S. W. 954 12
Bettle vs. *Republic Savings & Loan Association*, 63 N. J. Eq. 578 35
Bucsi vs. *Longworth Building & Loan Association*, 119 N. J. L. 120 ..... 3, 4, 34

Campbell vs. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483 26
Clarksville Building & Loan Association vs. *Stephens*, 11 Green 351 13
Canen vs. *Ziskind*, 195 N. E. (Mass.) 346 12
Columbia Building & Loan Association vs. *Jungquist*, 111 Fed. 645 20
Commonwealth vs. *Home and Savings &c. Association*, 106 S. W. (Ky.) 221 12
Coombes vs. *Getz*, 285 U. S. 434-452 32
Crane vs. *Hablo*, 258 U. S. 142 32
Curran vs. *Owens*, 15 W. Va. 208 30

Daley vs. *Peoples B. & L. Association*, 52 N. E. 1090, 172 Mass. 533 20

PAGE

Day vs. *Palisades Building & Loan Association*, 124 N. J. Eq., 199 Atl. 400 ..... 11, 14
Dillingham vs. *McLaughlin*, 264 U. S. 370 34
Dodge vs. *Board of Ed. of Chicago*, 5 N. E. (2d) 84, 364 Ill. 547 23

Englehardt vs. *Fifth Ward, etc. Association*, 148 N. Y. 281 18

Fitzgerald vs. *State Mutual Building & Loan Association*, 76 N. J. Eq. 137, 143 ..... 12, 13
Folk vs. *State Capital Savings and Loan Association*, 214 Pa. 63 Atl. 1013 11
Fornataro vs. *Atlantic Coast Building & Loan Association*, 10 N. J. Misc. Rep. 1248, 163 Atlantic 240 ..... 5, 31, 39
Foster vs. *Essex Bank*, 16 Mass. 245 26
Freeborn vs. *Smith*, 2 Wall. 160, 17 L. ed. 922 26
Fulia vs. *Warranty Building & Loan Association*, 5 F. Suppl. 952 14

Garland vs. *Filmer*, 1 Fed. Suppl. 8 27

Hackler vs. *Farm and Home Savings & Loan Association*, 6 F. Suppl. 610 ..... 11, 20
Heinbokel vs. *National S. B. & L. Association*, 58 Minn. 340, 25 L. R. A. 215 42
Holland vs. *Nakdimen*, 177 Ark. 920, 9 S. W. (2d) 307 23
Home Building & Loan Association vs. *Blaisdell*, 54 S. Ct. 231, 290, U. S. 398, 78 L. ed. 413 ..... 33, 35
Hopkins Federal Savings & Loan Association vs. *Cleary*, 56 S. Ct. 235, 296 U. S. 315, 80 L. ed. 251, 100 A. L. R. 1403 11
Horowitz vs. *Guaranty Building & Loan Association*, 17 Misc. Rep. 274 5
Hoyt vs. *Harbor & Suburban B. & S. Association*, 197 N. Y. 113, 90 N. E. 349 42

PAGE

Huber vs. *Home Savings & Loan Association*, 169 Pac. Rep. 979 24

Interstate B. & L. Association vs. *Hafter*, 24 Southern 871, 76 Miss. 770 24
Interstate B. & L. Association vs. *Wooten*, 113 Ga. 247, 38 S. E. 738 24
Islais vs. *Matteson*, 35 Pac. (2d) 1051, 78 Cal. App. Dec. 816 31

Johnson vs. *Mutual Guarantee Building & Loan Association*, 66 N. J. L. 683 18

Kimbro vs. *Colgate*, 5 Blatchf. 230, Fed. Case No. 7,778 30
Krinke vs. *Guarantee B. & L. Association*, 112 N. J. L. 317, 170 Atl. 637 14

Latimer vs. *Equitable L. & I. Co.*, 81 Fed. 776 ..... 12, 18, 31
Leach vs. *Commercial Savings Bank*, 205 Ia. 1154, 213 N. W. 517, 521 23
Leak vs. *Gay*, 107 N. C. 468, 12 S. E. 312 ..... 30, 32
Louisiana vs. *Mayor &c.*, 109 U. S. 285 ..... 30, 32
Lowell Co-Operative Bank vs. *Co-Operative Central Bank (Mass.)*, 191 N. E. 921 33

Maloney vs. *Real Estate B. & L. Association*, 57 Mo. App. 384 42
McGoldrick, Comptroller vs. *Gulf Oil Corporation*, U. S. Law, Week Jan. 16, 1940, Vol. 8, No. 3, Page 132 8
McPherson vs. *Rivay S. & B. Co.*, 93 Colo. 155, 25 Pac. (2d) 388 12
Mechanics B. & L. Association vs. *Conover*, 14 N. J. Eq. 219, 224 13
Milner v. *Gibson*, 61 S. W. (2d) 273, 249 Ky. 594 34
Moore vs. *Conover*, 123 N. J. Eq. 61, 195 A. 833 ..... 13, 14
Morley vs. *Railway Co.*, 146 U. S. 162 32

PAGE

Morris Resnick B. & L. Association vs. *Barnes*, 108 Pa. Sup. 218, 164 Atl. 358 12

Moss vs. *Smith*, 155 Pac. 90 ..... 30, 32

Mutual B. & I. Co. vs. *Frederick*, 43 Ohio App. 270, 183 N. E. 114 13

Mutual B. & L. Association vs. *Wilkinson*, 8 Fed. (2d) 997, 998 12

Napa State Hospital vs. *Flaherty*, 134 Cal. 315, 66 Pac. 322 32

National Surety Co. vs. *Architectural*, 226 U. S. 276, 33 S. Ct. 17, 57 L. ed. 221 29

Nelson vs. *Kilgore*, 145 U. S. 487, 12 S. Ct. 943, 36 L. ed. 786 23

N. J. Building Loan & Invest. Co. vs. *McNulty*, 71 A. 493 14

Nice Ball Bearing Co. vs. *Mortgage B. & L. Association*, 310 Pa. 560, 166 Atl. 239 40

Oshkosh Waterworks Co. vs. *City of Oshkosh*, 187 U. S. 439, 23 S. Ct. 234, 47 L. ed. 249 ..... 29, 34

Paul et al. vs. *Craemer, et al.*, 24 F. Suppl. 353 34

Pearsall vs. *Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 22

Peenie vs. *Reis*, 132 U. S. 464, 10 S. Ct. 149, 151, 33 L. ed. 426 23

People ex rel. Fairchild vs. *Preston*, 140 N. Y. 549, 35 N. E. 979, 24 L. R. A. 57, Endlich on Building Associations, 2d Ed., Chapter 1, Sections 7-12 and Chapter 2 11

People vs. *Title & Mortgage Guarantee Co.*, 190 N. E. 153, 264 N. Y. 69, 96 A. L. R. 297 34

Pittsley vs. *David (Mass.)*, 11 N. E. (2d) 461 30

Publicker vs. *Potash Bros. B. & L. Association*, 104 Pa. Sup. Ct. 530, 159 Atl. 58 25

Randall vs. *Krieger*, 23 Wall 137, 23 L. ed. 124 27

Renold vs. *Withers*, 13 F. Suppl. 921 14

PAGE

Richmond vs. *Hercules B. & L. Association* (Docket 58, p. 132) 39
Richmond Mortgage & Loan Co. vs. *Wachovia Bank & Trust Company*, 57 S. Ct. 338, 300 U. S. 124, 81 L. ed. 552 34
Robinson vs. *Howe*, 13 Wis. 341 ..... 29, 31
Rocker vs. *Cardinal Building & Loan Association*, 119 N. J. L. 134 ..... 3, 4, 20, 31, 39
Roncas vs. *New York B. L. B. Co.*, 84 N. Y. Supp. 879 42
Rosenplanter vs. *Provident Sav. Life Assurance Society of New York* (C. C. A. Tenn. 1899), 96 F. 721, 727, affirming C. C. 1899, 91 F. 728 30

Saunders vs. *State Building & Loan Association*, 121 Neb. 473, 237 N. W. 572 12
Shore vs. *Lone Star B. & L. Association*, 71 S. W. Rep. (2d) 863 23
Smith vs. *Reserve Fund B. & L. Association*, 156 Atl. (Pa.) 902 42
Society vs. *Clements*, 140 U. S. 266, 11 Sup. Ct. 822 31
Sommer vs. *Workingmen's B. & L. Association*, 17 N. J. Misc. Rep. 267 ..... 5, 13
State vs. *Massillon S. & L. Co.*, 110 Ohio State, 320, 143 N. E. 894 ..... 21, 33
State vs. *Sutton*, 83 N. J. L. 46, 87 N. J. L. 192, 244 U. S. 258, 61 L. ed. 1117 37
Stillwell vs. *Peoples B. & L. Association*, 54 P. 14, 19 Utah 257 19
Stilwell vs. *Peoples B. L. & S. Association*, 57 P. (Utah), 14, 17 42
Stone vs. *Mississippi*, 101 U. S., 814 33
Stone vs. *New Schiller B. & L. Association*, 153 A. 758, 302 Pa. 544 ..... 12, 27, 35, 40
Stone vs. *Schiller Building & Loan Association*, 302 Pa. 544, 153 Atl. 758, 760 25
Supreme Lodge K. of P. vs. *Hunziker*, 121 Ky. 33, 87 S. W. 1134 28

PAGE

Terry vs. *Anderson*, 95 U. S. 628, 24 L. ed. 365 29
Texas and N. O. R. Co. vs. *Miller*, 221 U. S. 408 20
Texas Homestead B. & L. Association vs. *Kerr*, 13 S. W. (Tex.) 1020 42
The East Saginaw Salt Mfg. Co. vs. *The City of East Saginaw*, 13 Wall. (U. S.) 373 30
Thirteenth Ward B. & L. Association vs. *Weissberg*, 115 N. J. Eq. 487, 494 ..... 14, 17, 18, 27, 31
Towle vs. *American B. & L. & Invest. Society*, 60 Fed. Rep. 131, 75 Fed. Rep. 938 25
Treigle vs. *Acme Homestead Association*, 297 U. S. 189, 56 Sup. Ct. Rep. 408 ..... 5, 9, 38

Union Dry Goods Co. vs. *Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. ed. 309 34
Union S. & Invest. Co. vs. *District Court*, 44 Utah 397, 140 Pac. 221 33
Union Savings & Investment Co. vs. *Salt Lake County*, 44 Utah 397, 140 Pac. 221 20
U. S. vs. *Cambridge Loan & Building Co.*, 278 U. S. 55 12

Wandell vs. *Jefferson Building & Loan Association*, 60 N. J. L. J. 9 14
Weir vs. *Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643 14
White vs. *Wogaman*, 54 P. (2d) 793, 47 Arizona 195 11
Willcox vs. *Edwards*, 123 Pac. 277 ..... 30, 32

Boston Beer Co. vs. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989 21

Frederick vs. *Mutual B. & I. Co.*, 128 Ohio State 474, 191 N. E. 729 ..... 13, 19

Intiso vs. *Metropolitan Savings Association*, 68 N. J. L. 588, 53 Atl. 206 19

Statutes Cited.

	PAGE
P. L. 1925, Chapter 65	2, 3, 6
R. S. 1937—17:12-53	2, 4, 6, 8, 18
P. L. 1933, Chapter 48	3, 6
P. L. 1932, Chapter 102	3, 4, 6, 7, 9, 10, 13, 18, 21, 34 36, 37, 38, 42
P. L. 1937, Chapter 188	6
R. S. 17:12-2, *et seq.*	7
P. L. 1935, Chapter 59, Sec. 52	13, 18
Laws 1925, Chapter 65, Sections 69, 18, 20, 26, 49 and 52	3, 7, 9, 10, 11, 18, 20, 21, 39
P. L. 1925, Chapter 65, Sections 56-59 inc.	14
P. L. 1891, Chapter 6	14
N. J. Constitution, Section 7, Par. 11	15
Chapter 65, Sec. 4, Pl. L. 1925	15
2 C. S. 1600, 1601	15
History of Building and Loan Associations in the United States, pages 488-491	17
P. L. 1899, Chapter 160	18
P. L. 1903, 457	18
1 C. S. 334	18
Laws 1936, Chapter 118	18
Laws 1913, Chapter 110, Page 326	24

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION, a corporation,
Appellee.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF ON BEHALF OF APPELLEE.

Preliminary Statement.

On April [redacted], 1939, appellant filed a complaint against the appellee in the New Jersey Supreme Court seeking a judgment for $8,500.00 plus interests and costs of suit. The complaint was grounded upon the theory that the appellant having become a member and shareholder of the appellee on October 1, 1928, was entitled to withdraw from such association and recover the value of his shares in accordance with the law with respect to withdrawal from such Associations as it stood at the time he became such member and shareholder, to wit, in accordance with Sections 49 and

52 of "An Act Concerning Building and Loan Associations, Revision of 1925," P. L. 1925, Chapter 65, that although he had on August 17, 1932 given notice of withdrawal to the appellee as required by said law, at which time appellee was solvent and although more than six months had elapsed the appellee failed and refused to pay appellant the value of his shares despite the requirement of the said statute that in no case should payment be postponed for a period longer than six months from the date of such notice of withdrawal and therefore that pursuant to said statute he became entitled to sue and recover the withdrawal value of his said shares (R. 1-4).

The appellee filed an answer April 24, 1939 denying appellant's right to recover and pleading as a First Separate Defense R. S. 1937—17:12-53 (R. 4-6).

Thereupon appellant gave notice of a motion to strike the answer of the appellee on the ground that the main answer was untrue in fact and sham and that the First Separate Defense was frivolous which notice was filed April 29, 1939 (R. 6).

Appellee in turn gave notice of a motion to strike appellant's complaint on the ground that it did not set forth a cause of action and that R. S. 1937—17:12-53 had not been complied with so that the Supreme Court was without jurisdiction to entertain appellant's claim, which notice was filed November 21, 1939 (R. 8).

These motions and the practice operative required the Supreme Court to strike the first defective pleading. That Court found appellant's complaint to be defective, ordered it stricken and entered judgment for the appellee (R. 10 and 11).

No opinion was filed by the Supreme Court in disposing of such motions.

Appellant appealed to the Court of last resort in New Jersey, the Court of Errors and Appeals charging that the Supreme Court erred in striking the complaint and entering judgment for the appellee and should have entered summary judgment for the appellant, in that R. S. 1937, 17:12-49, 17:12-50, 17:12-53, and P. L. 1933, Chapter 48, were unconstitutional and within the inhibitions of Article 4, Section 7, paragraph 3 of the Constitution of New Jersey; Article I, Section 10 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment of the Constitution of the United States and void so far as appellant's rights were concerned (R. 11 and 12).

At the time the notice of withdrawal was given by the appellant to the appellee, Section 52 of the Laws of 1925, Chapter 65, the law in effect when appellant acquired membership, had been amended by P. L. 1932, Chapter 102 (R. 9 and 13) and the appellant contended before the Court of Errors and Appeals that the 1932 Act was unconstitutional so far as he was concerned because it impaired the obligations of his contract of membership with the appellee (R. 13).

The Court of Errors and Appeals on September 22, 1939, based upon its prior decisions in *Bucsi* vs. *Longworth Building and Loan Association,* 119 N. J. L. 120, and *Rocker* vs. *Cardinal Building and Loan Association,* 119 N. J. L. 134, held that the Act in effect when the application for withdrawal was made (P. L. 1932, Chapter 102) governed the right to withdraw, that the Act was constitutional and that appellant had not pleaded facts bringing him within that Act. It therefore affirmed the action of the Supreme Court in striking appellant's complaint and entering judgment for the appellee (R. 12-15).

Despite the fact that the New Jersey Court of Errors and Appeals passed only upon the constitutionality of P. L. 1932, Chapter 102, appellant by his Assignments of Error (R. 15-18) and Points (R. 21) seeks merely a review and reversal of R. S. 1937, 17:12-53, and a declaration by this Court that the latter Act is unconstitutional.

Appellee moved to dismiss appellant's appeal on the ground that he seeks a reversal of an Act not passed upon by New Jersey's Court of Last Resort but this Court has noted probable jurisdiction. Nevertheless, appellee, conceiving that the matter of jurisdiction is a question to which the Court's attention may still be directed, particularly where, if appellee is correct in its contention, this Court in effect is being asked to render an advisory opinion, respectfully begs leave to argue preliminarily this question of jurisdiction.

The Court of Errors and Appeals of New Jersey Only Passed Upon and Decided the Constitutionality of P. L. 1932, Chapter 102, and Did not Pass Upon and Decide the Constitutionality of R. S. 1937—17:12-53.

The New Jersey Courts have on several occasions considered the Act of 1932 in withdrawal suits and have declared it constitutional as a proper exercise of the police power of the State, even where the shareholder had applied for withdrawal while the Act was still in effect under which he became a member, namely: Chapter 65, Laws 1925. *Bucsi* vs. *Longworth Building and Loan Association,* 119 N. J. L. 120, 194 Atl. Rep. 857. *Rocker* vs. *Cardinal Building and Loan Association,* 119 N. J. L. 134; see also *Rocker* vs. *Cardinal Building and Loan Association,* 13 N. J. Mis.

Rep. 397; *Fornataro* vs. *Atlantic Coast Building and Loan Association*, 10 N. J. Mis. Rep. 1248; 163 Atlantic 240; *Sommer* vs. *Workingmen's Building and Loan Association*, 17 N. J. Mis. Rep. 267; *Horowitz* vs. *Guaranty Building and Loan Association*, 17 N. J. Mis. Rep. 274.

Here the issue is even simpler than in such cases for the application for withdrawal by appellant was made months after Chapter 65, Laws 1925, had in fact been amended by Chapter 102, Laws 1932, so that the question before the Court of Errors and Appeals was simply whether the Act in effect when membership was acquired should govern or whether the law prevailing when the application was made applied. And incidentally that situation differentiates this case from that of *Treigle* vs. *Acme Homestead Association*, 297 U. S. 189; 56 Sup. Ct. Rep. 408, in which it was conceded that the shareholder had perfected his power to withdraw by actually applying therefor, before the new Act was passed.

Faced with the instant situation, the Court of Errors and Appeals determined that it was "entirely controlled by our holding in those cases," the Bucsi and Rocker cases, as indeed it was, for if a shareholder applying to withdraw under the Act in effect when he became a member, was nevertheless subject to a subsequently adopted regulation of the power to withdraw as within the police power of the State, manifestly appellant, who did not apply to withdraw until the State had elected to supplement the power to withdraw, could not successfully claim a vested right under the old law and that the new law impaired a contract.

It should be noted that the cases which the Court held to be controlling were decided prior to the adoption of the Revision of 1937, since that Revision was not enacted until

December 20, 1937, while the Bucsi and Rocker cases were submitted at the May, 1935, Term of the Court and decided October 26, 1937.

Furthermore, the Revision of 1937, of which the section here sought to be reviewed is a part, 17:12-53, was the work of years by a Commission appointed by the Legislature.

It is an independent enactment, Chapter 188, Laws 1937. It was not born of and in the conditions which the Court so strongly stresses in the Bucsi case and which evidently carried so much weight with the Court. How, then, can it be said that when the Court in the present case referred to the Bucsi and Rocker cases as controlling, it was passing upon a Revision with the development and enactment of which it must have been completely familiar?

Moreover, a mere examination of the Revision of 1937, 17:12-53, and Chapter 102, P. L. 1932, will demonstrate that they differ materially and that the Revision of 1937 varies more from Chapter 65, Laws 1925, Sections 49 and 52, much more, than does P. L. 1932, Chapter 102, if indeed the latter Act varies at all from the earlier Act in the light of its legal and proper construction and meaning. It would have been impossible for the Court of Errors and Appeals to have decided the constitutionality of Revision 1937—17:12-53 merely by the statement that its "holding" in the Bucsi and Rocker cases controlled.

As a matter of fact both appellant and appellee argued the constitutionality of P. L. 1932 and not the constitutionality of R. S. 17:12-53.

It is submitted that the issue before the Court was definitely whether appellant's complaint should be tested by the Act of 1925, Chapter 65, Sections 49 and 52 as appellant contended or P. L. 1932, Chapter 102, Sec. 52, as appellee submitted.

It is unfortunate that both in appellant's brief and in the opinion, in citing the Act of 1932, the section as enacted by the Revised Statutes of 1937 should also be cited as though identic with the Act of 1932. At least in the Court's opinion it is obvious that the Court did not intend to give the impression that the law as it stood in 1937 was the same as 1932 but rather to refer to the latest revision of the section. See the opinion on page 356 where it refers to "Chapter 65, P. L. 1925; R. S. 17:12-2, *et seq.*", the Revised Statutes reference being to the whole act as revised in 1937.

The Court said: "Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17:12-2, *et seq.*" Now obviously R. S. 17:12-2 was not in effect at the time of purchase and appellant is surely not claiming that he is to be governed by that Act; on the contrary he is claiming just the reverse.

Nor can the other reference to the Revised Statutes in the opinion be construed as an indication that the Court passed upon that Revision. The sentence reads: "But prior thereto (the application for withdrawal) the Legislature had amended the 1925 Statute by Chapter 102, P. L. 1932; R. S. 17:12-53." Certainly the Revision didn't amend the Act of 1925. It in fact repealed all prior laws. Nor was it enacted *before* appellant applied to withdraw, for he applied August 17, 1932 and the Revision was not enacted until December 20th, 1937. The reference by the Court to the Revised Statutes in this as in the other instance in the opinion was merely by way of reference to the law as existent when the opinion was written.

The wholesale reference to the Laws enacted regarding withdrawal after Chapter 65, Laws of 1925, as set forth in Paragraph 11 of appellant's complaint (R. 3), obviously could not strengthen his complaint or require the New

Jersey Courts to pass thereon, for as appellee stated in its Answer these allegations are argumentative in form and improper subject matter of complaint. As a matter of fact, appellee did not even answer such allegations (R. 5, Paragraph 11).

Nor could the pleading by appellee of R. S. 1937, 17:12-53 in its separate defense create an occasion for reviewing that section, for the record shows that neither trial court nor the Court of Errors and Appeals ever reached the answer from the standpoint of testing its legal efficacy. Both courts only considered the complaint as the first pleading showing a legal weakness and ordered it stricken.

That the law of 1937 could not apply is made manifest when it is realized that plaintiff-appellant's right of suit as claimed arose six months after the act of applying to withdraw, which six months expired February 17, 1933 from which date the six year Statute of Limitations would begin to run and would have barred the plaintiff-appellant had the statute been pleaded. This shareholder could not deprive the association of its right to plead the Statute of Limitations by invoking an act to govern his right of withdrawal that did not come into being until more than four years after he had applied for withdrawal.

We submit that appellant's appeal as framed should be dismissed. *McGoldrick Comptroller* vs. *Gulf Oil Corporation*, Decided January 15, 1940, U. S. Law Week, Jan. 16, 1940, Vol. 8, No. 3, Page 132 and cases cited in the opinion in such case.

However since this Court has noted probable jurisdiction and may therefore consider that P. L. 1932, Chapter 102 is properly here for review as one of the source statutes of Revision 1937, 17:12-53, we shall proceed to discuss the applicability and constitutionality of P. L. 1932, Chapter 102, but first we will summarize the issues involved.

Summary.

1. Appellant's power to withdraw must be governed by the Act in effect when he applied to withdraw, Chapter 102, Laws 1932 and not by the act in effect when he acquired membership, Chapter 65, Laws 1925, Sections 49 and 52.

2. Appellant's power to withdraw at the time the Act of 1932 was adopted was inchoate, a mere expectancy, and did not vest and was not perfected until the Act of 1932 had been enacted.

3. The case at bar is not controlled by the case of *Treigle* vs. *Acme Homestead Association*, 297 U. S. 189; 56 Sup. Ct. Rep. 408, for there the right to withdraw had been perfected by application before the amending act was passed; here the right to withdraw was perfected after the amendatory act was adopted.

4. To hold that appellant possessed a vested right of withdrawal under the Act of 1925 would result in inequity to his fellow members, preference to him at their expense and constitute a breach of his contract with them which calls for equality, mutuality and cooperation. He does not possess a vested right to work an injustice.

5. The power to withdraw, originally contractual, was made statutory in 1899 in New Jersey and ever since has not been the subject of contract and hence is not protected by the contract clause of the United States Constitution.

6. The power to withdraw subject to which appellant acquired his membership in the appellee was and is as much a part of the regulatory and supervisory control of such associations as the power to borrow, to invest, to declare dividends and to establish reserves and is equally subject to modification by the State and appellant can no more

possess a vested right in the statutory form that the State may have cast such power to withdraw than he would in such other powers or in any other police regulation.

7. Chapter 65, Laws 1925, is procedural in character and consequently subject to modification by the State.

8. Neither association nor member may contract with reference to such statutory privilege, nor waive, or barter or bargain it away. It is imposed upon association and member and always subject to alteration by the State.

9. Even if contractual, the power is subject to the proper exercise of the police power especially as building and loan associations are quasi public in character and appellant took subject to such power. P. L. 1932, Chapter 102 was a proper exercise of that power, especially as to an unperfected privilege.

10. No impairment of appellant's rights resulted from the adoption of the Act of 1932, since had the Act of 1925 been applied as appellant contends it must have resulted in those conditions within the association that would have prevented the payment of any withdrawals, levelled all shareholder rights and perhaps produced insolvency.

11. The Act of 1932 was substantially an express statement of the interpretation by the Courts of the Act of 1925 and the practice devised by the Courts to control such act to avoid the preference and discrimination that would have attended its rigid, legalistic application, and hence involved no real change in appellant's rights.

12. Appellant's complaint is insufficient to state a cause of action even under the Act of 1925 as interpreted by our Courts and as construed in the light of appellant's obligation to his fellow members.

The Power of a Building and Loan Shareholder to Withdraw From His Association Is Determined by the Statutes Regulating Withdrawal in Effect When the Application Is Made and Not by the Statutes in Effect When Membership Is Acquired.

At this point it might be well to describe a building and loan association and where it becomes necessary to refer to a statute the reference will be to the Revision of 1925, Chapter 65, P. L. 1925, as far as possible since that was the Act which was in effect when appellant acquired his shares and membership.

A building and loan association is a mutual, quasi-public, semi-philanthropic institution designed to teach thrift and to foster the home instinct, planned to make effective the savings of the workingman and small saver and particularly to enable him to acquire that home which makes for contented citizenship—12 C. J. S., Sec. 3.

Hopkins Federal Savings and Loan Association vs. *Cleary*, 56 S. Ct. 235, 296 U. S. 315; 80 L. Ed. 251, 100 A. L. R. 1403; *Hackler* vs. *Farm and Home Savings and Loan Association*, 6 F. Suppl. 610; *Folk* vs. *State Capital Savings and Loan Association*, 214 Pa., 63 Atl. 1013; *People ex rel. Fairchild* vs. *Preston*, 140 N. Y. 549; 35 N. E. 979; 24 L. R. A. 57; *Endlich on Building Associations*, 2d Ed. Chapter 1, Sections 7-12, and Chapter 2; *Day* vs. *Palisades B. & L. Assn.*, 124 N. J. Eq., 199 Atl. 400; *White* v. *Wogaman*, 54 P. (2d) 793, 47 Arizona 195, in which latter case the opinion contains a splendid description of the history, purpose, development and service of such institutions; 12 C. J. S., Sec. 3.

Its purpose is so salutary, its service so outstanding, that it enjoys legislative tendernesses, such as exemption from usury, income and other tax exemption and other benefits, while it is not the subject matter of bankruptcy—12 C. J. S., Sec. 4, Chapter 38; 47 Stat., Part 1; page 47; *U. S.* vs. *Cambridge Loan & Building Co.*, 278 U. S. 55; *Mutual B. & L. Assn.* vs. *Wilkinson*, 8 F. (2d) 183; 13 F. (2d) 997, 998.

It is a kind of incorporated partnership, the relation between its members is of a partnership nature and its fundamentals are equality, cooperation and mutuality.

> *Stone* vs. *New Schiller Building and Loan Association*, 153 A. 758; 302 Pa. 544; *Morris Resnick Building and Loan Association* vs. *Barnes*, 108 Pa. Sup. 218; 164 Atl. 358; *Cohen* vs. *Ziskind*, 195 N. E. (Mass.) 346; *Commonwealth* vs. *Home and Savings &c. Association*, 106 S. W. (Ky.) 221; *Fitzgerald* vs. *State Mutual Building and Loan Association*, 76 N. J. Eq. 137, 143; *Latimer* vs. *Equitable L. & I. Co.*, 81 Fed. 776; *Acklin* vs. *Peoples Savings Association*, 293 Fed. 392; *Bertche* vs. *Equitable L. & I. Co.*, 147 Mo. 434, 48 S. W. 954; *McPherson* vs. *Rivay S. & B. Co.*, 93 Colo. 155; 25 Pac. (2d) 388; *Saunders* vs. *State Building & Loan Association*, 121 Neb. 473; 237 N. W. 572.

Preferences are abhorrent to it; its shares are all common shares, though common shares payable in installments are defined as installment shares and shares paid in full are variously described as prepaid, full paid, paid-up and income shares, the correct name in 1925 being paid-up shares and now income shares—preferred shares are expressly forbidden; all members occupy the same relative

status as to debts and losses and all shares must be withdrawn on the same terms and conditions. Revision 1925, Chapter 65, Laws 1925, Sections 73 and 74; *Moore* v. *Conover*, 123 N. J. Eq. 61, 195 A. 833; *Fitzgerald* v. *State Mutual B. & L. Ass'n*, 76 N. J. Eq. 137-143.

A member remains a member until paid, Section 5, Chapter 65, P. L. 1925; *Sommer* v. *Workingmen's Building and Loan Association*, 17 N. J. Misc. Rep. 267, clarified and emphasized by P. L. 1932, Chapter 102, Section 52, and P. L. 1935, Chapter 59, Section 52.

Mutual B. & I. Co. vs. *Frederick*, 43 Ohio App. 270, 183 N. E. 114; *Frederick* vs. *Mutual B. & I. Co.*, 128 Ohio State 474; 191 N. E. 729.

At any stage of its existence it will have shareholders systematically or optionally paying on free shares looking toward the maturity of the shares; withdrawing or terminating members, those who because of fear, need or some other cause desire to quit the adventure and get their money back, full paid shareholders, those that have paid the maturity value of their shares and receive dividends thereon, and the borrowing member, he who receives the maturity value of his shares as an advance, to enable him to buy or build a home and who agrees to make payments on such shares until they mature, giving a bond and mortgage as evidence of such obligation and security therefor, that member whose mortgage debt becomes due in full in the event of dissolution or insolvency, with the liquidation of the assets of the association ultimately determining the value of his shares.

Revision 1925, Chapter 65, Laws 1925, Sec. 73; *Clarksville B. & L.* vs. *Stephens*, 11 Green 351; *Mechanics B. & L. Association* vs. *Conover*, 14 N. J. Eq. 219, 224;

Thirteenth Ward B. & L. Association vs. *Weissberg*, 115 N. J. Eq. 487, 170 Atl. 662;
Weir vs. *Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643;
N. J. Building Loan & Invest. Co. vs. *McNulty*, 71 A. 493.

Such associations are so closely regulated as to the establishment of reserves, the declaration of dividends, the borrowing of money, making investments, paying withdrawals and maturities and in other respects as virtually to be creatures of statute in duty bound to obey the statutory mandates and make effective the public policy of the state evidenced thereby. 12 C. J. S., Sec. 4 and cases cited:

Chapter 65, Laws 1925; Sections 69, 18, 20, 26, 49 and 52;
Moore vs. *Conover*, 123 N. J. Eq. 61, 195 Atl. 833, as to borrowing history and power.

Supervision is exercised by a Department of Banking and Insurance with wide powers, including the power to discontinue illegal or unsafe practices, and to take over, conserve or liquidate associations, the system being so comprehensive as to forbid the appointment of a Receiver by State or Federal Court in the absence of proof of refusal to act or abuse of power.

P. L. 1925, Chapter 65; Sections 56-59, inc.;
Day vs. *Palisade B. & L. Association*, 199 Atl. 400;
Fulia vs. *Warranty B. & L. Association*, 5 F. Suppl. 952;
Renold vs. *Withers*, 13 F. Suppl. 921;
Wandell vs. *Jefferson B. & L. Association*, 60 N. J. L. J. 9;
Krinke vs. *Guarantee B. & L. Association*, 112 N. J. L. 317; 170 Atl. 637;
P. L. 1891, Chapter 6.

Where an association is a member of a Federal Home Loan Bank or is insured by the Federal Savings and Loan Insurance Corporation, additional supervision and control exists.

The charters of and general acts under which such associations are created are subject to alteration or repeal by the legislature.

N. J. Constitution, Section 7, Par. 11;
Chapter 65, Sec. 4, Pl. L. 1925;
2 C. S. 1600, 1601.

When normally operating the intake from savers, investors and borrowers is ample to take care of the small minority of terminating members, but beginning with 1930 the scourge of unemployment played havoc with the intake side of the business, especially in the large cities, while creating abnormal demands for money saved and foreclosures and real estate acquisitions so that the intake of the associations soon, in too many associations, was woefully insufficient to meet the increasingly constant demands of terminating or withdrawing members.

Summary of Report of Committee on Trends, U. S. B. & L. League, as reported in Savings & Loan Journal for November 1939 and Report itself.

The public character of these institutions and the inherent power of the State to control and regulate such creations so as to promote the general welfare of all the people will be apparent and especially so when it is realized that at the advent of the depression, approximately one out of every four of the inhabitants of New Jersey was a shareholder and the fifteen hundred or more associations

of the State, held assets of in excess of a billion and quarter dollars.

The power of withdrawal is a characteristic of this type of institution.

Its existence is essential to the growth and development of an association, for according to a recent report of the Committee on Trends of the U. S. Building & Loan League, surveys of public opinion in 1934 and 1938-1939 clearly indicated that next to safety the public desired liquidity in a building and loan association. Savings and Loan Journal, November, 1939. On the other hand its undue exercise may be productive of grave danger if not death to the association. In a word it may make or break an institution. It will be obvious therefore that this power must be delicately balanced and carefully managed and regulated if the public purposes of such associations are to be achieved. The creation by Congress of the Federal Home Loan Bank System to create greater liquidity in such associations through enabling them to discount their mortgages at a member Bank and the insurance of the shares of such associations by the Federal Savings and Loan Insurance Corporation is a recognition by the Congress of the public importance of such institutions and the necessity of preserving them against the undue exercise of the withdrawal power in time of stress.

Thus the control of this power by the State as a part of a system of regulation is as important as the control of the power to borrow, to invest, to declare dividends and to establish reserves.

And yet originally no such control existed. Indeed in their initial form no power to withdraw from Building and Loans existed at all; withdrawal was akin to breach of contract and entailed forfeiture and when finally conferred was the creature of by-law or statute.

Thirteenth Ward B. & L. Association vs. *Weissberg*, 115 N. J. Eq. 487; 170 Atl. 662.

Prior to 1899 the power to withdraw was wholly contractual, conferred, if at all, by a constitution or by-law of an association. It was wholly unregulated by the State.

It is not strange then with National, State and local associations operating under pitifully inadequate statutes that the control of such institutions too frequently fell into the hands of promoters, speculators and unscrupulous individuals more interested in self than those they represented or the community and that the scandal resulted which the Court speaks of in the Bucsi case.

Withdrawal was granted or withheld according as competition dictated, operating expenses were excessive, deductions on withdrawal unconscionable and the instinct of thrift too frequently sacrificed upon the altar of private greed.

The brief of Messrs. Warren and Simandl submitted on the reargument of the Bucsi and Rocker cases in the New Jersey Court of Errors and Appeals after the decision of this Court in the Treigle case, devotes forty-seven pages to the history of the building and loan in New Jersey with particular reference to this period of contractual control, and mismanagement of the power to withdraw and shows graphically and vividly the crying public need for withdrawal legislation recognized and demanded by the Governors of this State, the Chiefs of the Bureau of Labor Statistics, the Banking Commissioners, the press, two legislative committees and a grand jury. We plan to procure a copy of such history for the Library of this Court. See also History of Building and Loan Associations in the United States, pages 100-103, inc., and particularly that portion relating to New Jersey, at pages 488-491.

Responsive to this public demand the Legislature finally in 1899, P. L. 1899, Chapter 160, took from such associations the power to control this power contractually and placed it beyond the reach of private temptation and spoils. The State undertook to regulate and control this Damocles-like power in the interest of all the people and has controlled and regulated it from time to time in the light of existing conditions.

In 1903, P. L. 1903, 457, 1 C. S. 334, it adopted the first comprehensive B. & L. statute and by sections 38 and 39 established the statutory power of withdrawal which when the Revision of 1925, Chapter 65, P. L. 1925, was adopted become sections 49 and 52, those relied upon by appellant here. The power was amended in 1932, P. L. 1932, Chapter 102, in 1935, Chapter 59, Laws 1935, Chapter 118, Laws 1936 and finally R. S. 1937, 17:12-53, a practical reenactment of the withdrawal law of 1936. Thus as early as 1899 and more definitely so since 1903 the State has elected to control and regulate this withdrawal power and so establish the public policy of the State as to withdrawals, and subject to which policy and control appellant acquired his membership in 1928.

> *Thirteenth Ward B. & L. Assn.* vs. *Weissberg*, 115 N. J. Eq. 487, 492 and 493; *Adams* vs. *Union National S. & L. Association*, 55 Ind. A. 676; 100 N. E. 389, 102 N. E. 145; *Latimer* vs. *Equitable Co.*, 81 Fed. 776.

When the power was contractual it was subject to modification by amendment of the constitution or by-laws of an association.

> *Johnson* vs. *Mutual Guarantee B. & L. Association*, 66 N. J. L. 683; *Englehardt* vs. *Fifth Ward, etc. Association*, 148 N. Y. 281; *Beardon*

vs. *Peoples Building & Loan Association*, 49 S. W. (Tenn.) 64; *Stillwell* vs. *Peoples Building & Loan Association*, 54 P. 14, 19 Utah 257; *Frederick* vs. *Mutual Building & Invest. Co.*, 191 N. E. 729, 128 Ohio State, 474; certiorari denied 55 S. Court, 239; 293 U. S. 624, 79 L. Ed. 711;

And it is significant that in *Intiso* vs. *Metropolitan Savings Association*, 68 N. J. L. 588; 53 Atl. 206, the Court denied the power of the Legislature to alter such contractual power.

We say it is significant for this decision was in 1902 and related to the situation as it existed upon the adoption of the first statutory power of withdrawal in 1899, and read in the light of the comprehensive building and loan act enacted in 1903 with the power to withdraw and the terms thereof worked out, can only mean that the Legislature intended to do away with the situation where the State was powerless to control such transactions and instead place such transactions subject to the regulatory police power of the State. And in so doing it did not intend that a power which when contractual and in the control of management was subject to modification at slimly attended shareholders meetings, should in the hands of the State *be frozen in a membership contract and forever freed of State regulation or control.* On the contrary it was doing just the reverse, changing the power from a dubious contractual right to a police regulation as much an integral part of its system of supervision and control of such associations in the general welfare as the powers to borrow, invest or declare dividends and the duty to set up reserves.

Thus the new era began and all shareholders acquired membership in such associations charged with knowledge of such State power and subject thereto.

Agnew vs. *Macomb B. & L. Association*, 64 N. E. 260; *Rocker* vs. *Cardinal B. & L. Association*, 13 N. J. Misc. Rep. 397, 409; *Columbia B. & L. Association* vs. *Jungquist*, 111 Fed. 645; *Daley* vs. *Peoples B. & L. Ass'n.*, 52 N. E. 1090, 172 Mass. 533.

Hence the appellant when in 1928 he became a member of the appellee did so subject so far as the power to withdraw was concerned, to the power of the State to alter, or amend or supplement the police regulation then in force as to withdrawals, to wit:

Sections 49 and 52, Chapter 65, P. L. 1925; *Hackler* vs. *Farm and Home S. & L. Association*, 6 Fed. Suppl. 610; *Union Savings & Investment Co.* vs. *Salt Lake County*, 44 Utah 397; 140 Pac. 221.

To contend as he does now that he acquired a vested right in the power of withdrawal as it stood at the acquisition of membership, is to destroy the very purpose of the Legislature in removing the power from management and a contractual status to the State and a statutory basis.

To so contend is to claim that the State may contract away its police power or that the association, the State's creation, may so contract as to oust the State of control and regulation of and over this vital element of a building and loan association. This is not the law. *Texas and N. O. R. Co.* vs. *Miller*, 221 U. S. 408, in which this Court in rejecting the claim that a provision in a railway charter exempting the company from liability for the death of its servants, even if caused by the company's negligence, was within the protection of the contract clause of the U. S. Court, because

the subject was one over which the Legislature possessed a regulating but not a contracting power said:

> "The doctrine that a corporate charter is a contract which the Constitution of the U. S. protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction." See also *Boston Beer Co.* vs. *Massachusetts,* 97 U. S. 25, 24 L. Ed. 989.

Again in *State* vs. *Massillon S. & L. Co.,* 110 Ohio State, 320, 143 N. E. 894, the Court in determining that a contract by the association providing for the sale of stock memberships in the association was governed by subsequent legislation forbidding such sales held that:

> "While the state may not impair a completed contractual obligation, a building and loan company cannot so enter into contracts, reaching into the future touching the sale of its stock and memberships, as to deprive the state in the proper exercise of its police power from controlling such sales in the future." *Syllabus.*

So here neither the State nor the appellee had the power to create a contract of membership embedding Chapter 65, Laws, 1925, Sections 49 and 52 in it as that the State could not by P. L. 1932, Chapter 102 modify such sections before the Appellant exercised such power to withdraw.

To contend as does the appellant is to claim he acquired a vested right in the then method of regulation of withdrawals devised by the Legislature to govern a solvent and

going association and that never could it modify that procedure to meet new conditions and situations or to profit by experience. To so contend is to hold that a power which the State need not have conferred, must, once conferred, remain as unchangeable as the laws of the Medes and Persians. Fortunately for the people of this State this is not the law. The right is not a vested one. It is at best a mere expectancy subject to change by the Legislature, at least until perfected by application for withdrawal and the elapsing of six months therefrom.

In *Bedford* vs. *Eastern B. & L. Association*, 181 U. S. 227, a case cited on the brief of appellant, this Court held that, the issuance of a certificate of stock to a member of a foreign loan association, *and his application for a loan*, (italics ours) made before the passage of a statute restricting the right of the association to do business in the State, constituted a contract, the obligation of which could not be impaired by such statute; and therefore a loan made on that application after the statute was passed and to which his contract gave him a right, is valid, notwithstanding the statute. The Court said: "The building association was incorporated under the laws of N. Y. to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing,—means in the treasury, *a tender of good security*, (italics ours)—the contingent right became a vested one, a contract was formed; and can there be doubt that it was enforceable against the association."

And in *Pearsall* vs. *Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838, it was decided that a bare unexecuted power to consolidate with other corporations, given to a railroad company by its charter, is not, so long as it continues unexecuted, a vested right protected from

control or revocation by the Legislature,—at least so far as it applies to parallel or competing lines.

In *Nelson* vs. *Kilgore*, 145 U. S. 487, 12 S. Ct. 943, 36 L. Ed. 786, in holding that a law of Tennessee which declared that the rents and profits of a married woman should not be subject to the debts of her husband, was valid as applied to a judgment against the husband rendered before the passage of the Act, the Court laid stress upon the fact that when the Act was enacted the particular profits of the wife's estate had not come into the hands of the husband; they were not vested in him, he had a mere expectancy. He had not exercised his right to reduce the profits to possession.

> See also *Leach* vs. *Commercial Savings Bank*, 205 Ia. 1154; 213 N. W. 517, 521. Sutherland on St. Const., Sec. 163; Cooley Const. Lim. (7th Ed.), 359, 360; 4 R. C. L., Sec. 16; *Dodge* vs. *Board of Ed. of Chicago*, 5 N. E. (2d) 84, 364 Ill. 547; *Peenie* vs. *Reis*, 132 U. S. 464; 10 S. Ct. 149, 151, 33 L. Ed. 426.

In *Shore* vs. *Lone Star B. & L. Association*, 71 S. W. Rep. (2d) 863, when the association was incorporated no statute existed regulating membership fees but the association adopted a fee in its by-laws and made a contract with one Elkon as its sole agent to sell stock and memberships for ten years, he to get $2.25 out of every $2.50 membership fee. Subsequently a statute was passed fixing a maximum membership fee to be charged by building and loan associations, which fee was less than the by-law and contract membership fee. Held that the state had the power to pass such legislation, that the state's reserved power in the premises could not be contracted away as provided in the Elkon contract and that the new statute did not impair the obligation of contract. See also *Holland* v. *Nakdimen*, 177

Ark. 920; 9 S. W. (2d) 307, a somewhat similar situation involving a Bank and interest contracts.

In *Huber* vs. *Home Savings and Loan Association*, 169 Pac. Rep: 979 (Wash.), plaintiff, who became a member of the association on March 28, 1907, sued to recover the withdrawal value of his shares. The Court said:

> "The withdrawal value of respondent's stock is not to be determined by the act of 1903, but by Chapter 110, Laws of 1913, p. 326 (Rem. Code, Sec. 3601-1, *et seq.*);
>
> The withdrawal value of the stock must be determined by the financial condition of the association and the laws in force at the time of the withdrawal under which each share of stock is chargeable with its pro rata share of loss."

The case of *Interstate B. & L. Association* vs. *Hafter*, 24 Southern 871, 76 Miss. 770, holds that a by-law of a building and loan association permitting loans to be paid off before maturity on the estimated basis that 84 payments of dues and interest would mature the borrower's stock and cancel the debt may be repealed, as against a *borrower who has not sought to take advantage of it up to the time of repeal* (italics ours), where at the time the loan was made the by-laws provided that they might be amended.

On the other hand, in *Interstate B. & L. Association* vs. *Wooten*, 113 Ga. 247, 38 S. E. 738, the reverse view was expressed because the Court considered that borrower's mortgage contract did not contain the right to amend the by-laws so as to bind the borrower. But as to free shareholders like the appellant here, the Court said:

> "Where one, on joining a building and loan association, voluntarily consents that it may subsequently alter, amend or repeal their existing by-laws . . . the only vested right which he acquires by reason of

his contract of membership is that he shall at all times stand upon an equal footing with his fellow members as regards the privileges extended to and the burdens imposed upon them. This being so, should he thereafter desire to rescind that contract and cease to be a member, he would be entitled *to do so upon such terms only as the association was for the time being inviting its stockholders to accept, though upon his giving due and formal notice of his acceptance of the offer then extended to members wishing to sever their connection with the association his privilege of withdrawing therefrom upon those terms would immediately become a vested right,* which could not be defeated by its tardily undertaking by means of a change subsequently effected in its by-laws to recall the offer thus voluntarily made by it." (Italics ours.)

The only vested right the appellant possesses is a vested right to equality of treatment with his fellow members; what he desires is a vested preference, a fixed discrimination.

Each shareholder, upon becoming a member of this association, agreed with every other shareholder that he would share with him equally the profits and bear with him equally the losses of the common enterprise, would not be entitled to any preferences and that equality would prevail in withdrawal. See especially Section 74, Chapter 65, Laws 1925. Each shareholder, upon accepting his certificate of stock, agreed that he would be a mutual participant in the fortunes of the association, whether good or bad.

Towle vs. *American B. & L. & Investment Society*, 60 Fed. Rep. 131; 75 Fed. Rep. 938; *Endlich Building Association* (2d Ed.), Sections 121-123, 514, 523, 524, &c.; *Stone* vs. *Schiller Building and Loan Association*, 302 Pa. 544, 153 Atl. 758, 760; *Publicker* vs. *Potash Bros. B.*

& L. Association, 104 Pa. Sup. Ct. 530; 159 Atl. 58.

Times having changed, the Association having fallen on evil days, the appellant rejects the agreement of equality and wants to leave the venture with his investment and let his fellows fend for themselves.

This he cannot do. Chief Justice Parker, in *Foster* vs. *Essex Bank,* 16 Mass. 245, is quoted in *Freeborn* vs. *Smith,* 2 Wall. 160, 17 L. Ed. 922, as follows:

> "The truth is, there is no such thing as a vested right to do wrong, and the Legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

Neither is there a vested right to work an inequity and it would produce gross discrimination and preference to permit appellant merely because he has elected to terminate his membership contract, to sue and recover from the appellee at a time when changed conditions, depleted receipts, frozen assets and widespread economic distress, find appellee, in that condition where to pay appellant may well result, upon the ultimate disposal of its assets, in appellant's fellow members getting proportionately less of the assets of the common enterprise than appellant should have been paid. If the right to defeat a just debt by the statute of limitations is not a vested right, *Campbell* vs. *Holt,* 115 U. S. 620, 6. S. Ct. 209, 29 L. Ed. 483, no more is there a vested right in a statute productive of inequity and inequality.

If Chapter 65, Laws 1925, means what appellant declares it means and applies despite the changed conditions, then obviously the Legislature enacted either an unwise or

an inadequate withdrawal regulation, and consequently possessed the right to correct, to cure, the situation in the interest of all the members, so as to accomplish the equality all bargained for; or if the statute is unclear in its application the Legislature may clarify it. *Garland* vs. *Filmer*, 1 Fed. Suppl. 8. And in repealing the right of suit after six months non-payment, retaining the payment of withdrawals in order of filing and the one half of receipts application, subject only to equal distribution among all withdrawing shareholders where such receipts should prove insufficient to pay all such shareholders, with the right of suit if the new method of payment should not be followed, the L. slature sought only to cure a discriminatory, inequitable, preferential condition likely if persisted in, to produce insolvency, foreclosure, loss of homes, economic distress and to deprive the community of the service of hundreds of such public service, character and home building agencies. And appellant not having exercised his right under the defective statute is bound by the curative or clarifying one for he is not only presumed to consent to right the wrong, *Randall* v. *Krieger*, 23 Wall 137, 23 L. ed. 124, but has by his contract with his fellow members agreed so to do. *Stone* vs. *Schiller B. & L. Assn.*, 302 Pa. 544; 153 Atl. 758, 760; *13th Ward B. & L. Assn.* v. *Weissberg*, 115 N. J. Eq. 487, 495, 170 Atl. 662, 665.

It should be realized that if appellant merely by virtue of his membership contract, possesses a vested right in the State police regulation of 1925, then, despite the statute, Sec. 74, Chapter 65, Laws 1925, forbidding preferred shares, appellant is a preferred shareholder while his fellows who continue their savings and the borrowing members are mere common shareholders and that he is entitled to withdraw on terms variant from those upon which shareholders being members subsequent to 1932 may withdraw and this in

the face of the statute providing for equal withdrawal privileges.

If this is so, since the withdrawal power was changed in 1932, 1935, 1936 and 1937, we have in one association common shareholders with preferred rights, under each succeeding regulation change. It would make for confusion worse confounded, beget a variety of liabilities in the same class of contracts and among members having equal rights in the assets of the association and equally responsible for its losses and must be rejected because it would be at war with the whole scheme of mutual co-operative saving and home building so highly prized and carefully nurtured by the State and nation. *Supreme Lodge K. of P.* v. *Hunziker*, 121 Ky. 33, 87 S. W. 1134.

Having in mind appellant's entire membership contract with his association and his fellow-members, the sound construction of it is that until he avails himself of the regulation in effect at purchase of his shares the regulation may be changed and he governed thereby and even after application the State in the proper exercise of its police power may modify such privilege.

"The right of withdrawal which is a peculiar feature of building and loan associations is not conferred upon a member for the purpose of enabling him to escape his just proportionate responsibility for losses incurred by an insolvent Association but for the purpose of securing to each member the privilege of withdrawing his proportionate share of the accumulated funds. It would be to pervert the privilege to allow it to be used for the purpose of obtaining an unjust advantage over the fellow stockholders of the withdrawing member. . . ." 4 R. C. L. 355.

But in Any Event the Regulation of 1925, Sections 49 and 52, Chapter 65, Laws 1925, Is a Mere Statutory Privilege or Simply Procedural in Character.

If it is simply a procedure whereby the privilege of withdrawal may be enforced, management compelled to apply receipts in its possession to the payment of appellant's demands, the right to sue after six months non-payment, is then subject to modification by the State. *Terry* v. *Anderson*, 95 U. S. 628, 24 L. ed. 365, where the Court declared:

> "And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy it is well settled that the legislature may change them at its discretion provided adequate means of enforcing the right remain".
>
> *Oshkosh Waterworks Co.* vs. *City of Oshkosh*, 187 U. S. 439, 23 S. Ct. 234, 47 L. ed. 249; *Natl. Surety Co.* v. *Architectural*, 226 U. S. 276, 33 S. Ct. 17, 57 L. ed. 221; *Robinson* v. *Howe*, 13 Wis. 341.

If the regulation or privilege in question is purely statutory in origin unknown to the common law, then that which the state gives it may take away as long as the right is inchoate and has not been exercised. The privilege here is of statutory origin, is unknown at common law. Indeed

it did not exist as a matter of statutory privilege and protection prior to 1899 and once was denied altogether. And appellant did not elect to exercise the right until after it had been altered. *Kimbro* v. *Colgate*, 5 Blatchf. 230; Fed. Case No. 7,778, *Willcox* v. *Edwards*, 123 Pac. 277; *Moss* v. *Smith*, 155 Pac. 90; *Curran* v. *Owens*, 15 W. Va. 208; *Pittsley* v. *David* (Mass.), 11 N. E. (2d) 461; *The East Saginaw Salt Mfg. Co.* v. *The City of East Saginaw*, 13 Wall. (U. S.) 373; *Louisiana* vs. *Mayor &c.*, 109 U. S. 285; *Leak* v. *Gay*, 107 N. C. 468, 12 S. E. 312 and *Rosenplanter* v. *Provident Sav. Life Assurance Society of New York* (C. C. A. Tenn. 1899), 96 F. 721, 727, affirming C. C. 1899, 91 F. 728. Policy not forfeitable without certain prescribed statutory notice. Requirement later repealed and after contract of insurance had arisen. Repeal not impairment of contract. "It was only a statutory regulation for the government of insurance companies".

There is "a distinction between those rights which the law gives to, or obligations which it imposes upon persons in certain relations, merely in carrying out its own view of policy, and independently of any stipulation which the parties may have made and those rights which the law itself, even in carrying out some matter of general policy authorizes to be made the subject of express contract between the parties. In the former case, the rights being derived entirely from the law, and not from the contract, laws changing them are not within the prohibition (the contract clause of Constitution). But in the latter case, although the law authorized the rights to be acquired, yet it authorized them to be acquired only by a contract stipulating for them, and having been so acquired such contract must be held to be within the protection of the Constitution.

The question therefore is, not whether the right was acquired in the execution of some measure of public policy

but whether it was derived from the law only, or was stipulated for in a contract which the law itself authorized the parties to enter into. In the former case, the law may withdraw the right it granted, but in the latter having found it necessary in accomplishing its object to resort to the agency of actual contracts it cannot after they are made impair their obligation." *Robinson* v. *Howe*, 13 Wis. 341. See also *Islais* v. *Matteson*, 35 Pac. (2d) 1051, 78 Cal. App. Dec. 816. The right here was given members of building and loan associations regardless of and despite their membership contract. It was imposed upon all associations. It may not be contracted away, waived or avoided and by-laws or contracts so doing are void. *Society* v. *Clements*, 140 U. S. 266, 11 Sup. Ct. 822; *Latimer* v. *Equitable L. & I. Co.*, 81 Fed. 776; *Adams* v. *Union Natl. S. & L. Assn.*, 55 Ind. A. 676, 100 N. E. 389, 102 N. E. 145. The association and prospective or actual members were in fact forbidden to contract for or about it. They made their contracts subject to it. It was not a part of the contract, it was above and beyond and dominated whatever contract was made. It reflected the state's policy and neither association nor member could take it or leave it. They must take it or not contract at all. No question of mutual assent, bargaining at arm's length or otherwise, or the meeting of minds is involved with this statutory imposition. As our highest court has said: "The right of withdrawal springs from the statute, and not from contract. The shareholders could not, of course, by constitution or agreement, override the statute." *Thirteenth Ward B. & L. Assn.* vs. *Weissberg*, 115 N. J. Eq. 487, 494. And again at page 493: "The right to withdraw, without the forfeiture of the money paid in, is in its essence a privilege." See also *Rocker* vs. *Cardinal B. & L. Assn.*, 13 N. J. Misc. Rep. 397, and *Fornataro* vs. *Atlantic Coast B. & L. Assn.*, 10 N. J. Misc. Rep. 1248, 163 Atl. 240, where the

power to withdraw was held to be a statutory privilege. Hence the power to withdraw not being contractual, it is denied the protection of the contract clause of U. S. Constitution and may be changed by the State, at least until the right has been exercised. *Crane* v. *Hablo*, 258 U. S. 142; *Louisiana* vs. *Mayor*, 109 U. S. 285; *Morley* v. *Railway Co.*, 146 U. S. 162, interest not provided for by contract but by statute is changeable by legislature without impairment of contract; *Leak* v. *Gay*, 107 N. C. 468, 12 S. E. 312.

The case of *Coombes* vs. *Getz*, 285 U. S. 434-452, cited by appellant in his brief, far from supporting the position of appellant, recognizes the situation contended for by the appellee, for in that case the court found that the right of the petitioner there to enforce liability "had become fully perfected and vested prior to the repeal of the liability provision." Not so here. Moreover, the court found there that the petitioner's cause of action was not purely statutory. It arose upon a contractual liability and the court distinguished the situation there from the cases of *Moss* vs. *Smith* and *Wilcox* vs. *Edwards* herein cited as supporting the position of the appellee.

Likewise, the court, in the *Coombes* case, recognized that the *Ettor* case, 228 U. S. 148, also cited by the appellant, was one in which the rights had vested and not a situation where the right was inchoate as here. As Justice Sutherland said in comparing the case of *Napa State Hospital* vs. *Flaherty*, 134 Cal. 315, 66 Pac. 322, with the situation in the *Coombes* case, "The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. (So here.) No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. (So here.) No element of a contract was present. (So here.) Here both parties acted." In our case neither party acted with re-

gard to the power to withdraw, for under the law they could not.

The power of withdrawal in New Jersey is purely statutory and in no sense contractual.

Nevertheless, Even if the Power Is Contractural and Vested It Is Subject to Modification in the Proper Exercise of the Police Power of the State, and P. L. 1932, Chapter 102, Was a Proper Exercise of that Power.

Building and Loan Associations are proper if not special subjects of legislative control, regulation and supervision and strictly and particularly within the internal police power of the State. They are subject to such reasonable regulations as the State may impose in the exercise of such power in the interest of the protection of the public and for its good and welfare. The following cases sustain this statement and illustrate its application, in most of the cases, to building and loans, their relations, contracts and governing legislation.

Lowell Co-Operative Bank vs. *Co-Operative Central Bank (Mass.)*, 191 N. E. 921; *Un[illegible] S. & Invest. Co.* v. *District Court*, 44 Utah 397, 140 Pac. 221; *State* v. *Massillon S. & L. Co.*, 110 Ohio St. 320, 143 N. E. 894; *Stone* v. *Mississippi*, 101 U. S. 814; *Bank of Oxford* v. *Love*, 250 U. S. 603; 40 S. Ct. 22, 64 L. ed. 1165; *In re: Opinión of the Justices*, 181 N. E. 836, involving bill to establish a Central Bank for Massachusetts Building & Loans; see also 181 N. E. 833.

Since such associations and their members are subject to statutory regulation, supervision and control, they and their contracts must yield to the exercise of the State's power to protect its people and to care for their welfare. *Home B. & L. Ass'n.* v. *Blaisdell*, 54 S. Ct. 231; 290 U. S.

398; 78 L. ed. 413; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. ed. 309 and cases above cited. *Paul, et al.* v. *Craemer, et al.*, 24 F. Suppl. 353 where statute was upheld which reduced interest on building and loan securities from 6% to 4%. *People* v. *Title & Mortgage Guarantee Co.*, 190 N. E. 153, 264 N. Y. 69, 96 A. L. R. 297. Parties to contracts have no right in the protection of remedies existing at the time of entering into the contract and the state may at liberty change them if a substantial efficacious remedy remains, or is given by means of which a party to it may enforce his rights under the contract—*Richmond Mortgage & Loan Co.* vs. *Wachovia Bank & Trust Company*, 57 S. Ct. 338, 300 U. S. 124, 81 L. ed. 552; *Oshkosh Water Works* v. *Oshkosh*, 187 U. S. 437; 23 S. Ct. 234, 47 L. ed. 249; *Milner* v. *Gibson*, 61 S. W. (2d) 273, 249 Ky. 594; *Dillingham* vs. *McLaughlin*, 264 U. S. 370.

Applying these cases and principles to P. L. 1932 Chapter 102, it easily survives the charge of constitutional invalidity preferred against it.

The economic dislocation with its social consequences under which the nation was and had been suffering and struggling at and prior to the enactment of P. L. 1932, Chapter 102, is familiar to the Court and adequate, complete description of it may be found in opinions of this Court, while the opinion of the Court of Errors and Appeals in *Bucsi* v. *The Longworth B. & L. Association*, 119 N. J. L. 120, 190 Atl. 857, fully outlines the conditions in New Jersey which inspired and required legislative action in the common welfare.

The need for such agencies as the Federal Home Loan Bank System which came into being in the summer of 1932, the Home Owners Loan Corporation, the Reconstruction Finance Corporation and the Federal Savings & Loan

Insurance Corporation, emphasize the effect of the depression upon home owning, mortgages and real estate for all were the products of conditions existent in 1932 and thereafter and all to a greater or lesser degree were designed to aid building and loans and conditions therein and the members thereof and borrowers therefrom. Of the $175,270,510.00 loaned in New Jersey by the H. O. L. C. and for which its bonds were given to Banks, Mortgage Companies, Insurance Companies, other institutions and individuals, the building and loans received approximately Ninety Million, while in the Country as a whole they received $900,000,000, approximately as against total bonds issued of $3,093,000,000.

The conditions with respect to mortgages and homes and home ownership which justified the Court's action in *Home Building & Loan Association* v. *Blaisdell*, 54 S. Ct. 231, 290, U. S. 398, 78 L. ed. 413, were naturally existent as to the building and loan movement in New Jersey and its member borrowers, and affected and applied to the appellee Association.

Action was required. Withdrawal suits and judgments threatened the life of Associations and movement for such actions accentuated an already distressed real estate market, imperilled loans, brought on execution sales, forced liquidation, additional foreclosures, more loss of homes, increased fear by members as to the safety of their investment with resultant further withdrawals and lessened payments on shares and loans or a state of actual or potential insolvency. *Bettle* v. *Republic Savings & Loan Ass'n.*, 63 N. J. Eq. 578; *State* v. *New Schiller B. & L. Ass'n.*, 302 Pa. 544, 153 Atl. 758.

Was the State faced with the alternative of insolvency for these Associations with the consequent injury to the economic welfare of the State and its financial system or

of submitting to the claimed right of the withdrawing shareholders under the 1925 act? Manifestly not. It could and did have recourse to its police power. It was not compelled to allow the tail to wag the dog, the terminating member to dominate the continuing, saving and borrowing member. It was entitled to further regulate all in the interest of all. It was not required to allow the Associations to operate with discrimination and preference for the benefit of the terminating members.

And to forestall this it adopted Chapter 102, Laws 1932 which in effect allowed the Association to do what the State could have done had it taken the Association over and what the Courts could and did do, namely, devote a portion of Association receipts to withdrawing members in order, where sufficient and equally among them if not, with suit suspended as long as such allocation was made; thereby preserving the Association's assets against sacrificial liquidation and the Association for future usefulness when improved conditions should permit renewed savings, sales of real estate for sound prices and regular payment on mortgages.

Appellant says that mathematically as much money would be so paid out to all withdrawing shareholders and the assets depleted as much as if the laws of 1925 were complied with, and that all the 1932 act does is to redistribute such receipts to different people and more people. What appellant overlooks is that compliance with the Laws of 1925 meant discrimination and preference, compliance with 1932, equity and equality; and discrimination meant danger to Association and management in suits by those discriminated against.

Again appellant complains because in the 1932 Act the matured shareholder's rights are recognized, he who has completed his contract; appellant complains and apparently

thinks he should have preference over such shareholder and that the recognition of the matured shareholder impairs appellant's contract. Why a terminating member should be entitled to preference over one who has completed his contract with the Association and his fellows is difficult to see but in any event nothing appears in the complaint or otherwise to show that the operation of this provision of the statute affects appellant injuriously and actually deprives him of a constitutional right. The consideration of the constitutionality of a statute is limited by the exact case presented.

State vs. *Sutton*, 83 N. J. L. 46, 87 N. J. L. 192; 244 U. S. 258, 61 L. ed. 1117.

Again appellant appears to contend that his contract is impaired because the right to sue after six months nonpayment is repealed. In the first place the gift that the Legislature made to those in his class could be taken away or modified by the same conferring power. But in any event it should be borne in mind that Chapter 102, Laws 1932 did not destroy or impair the remedy theretofore existent. The right to sue remains. The new Act merely changed the law from one where suit could not be brought for six months as long as one half the receipts were applied and then not if receipts were applied reflective honestly of the condition of the association; to a situation where under certain circumstances suit might be instituted in ten days or thirty days, dependent upon the association's observance of the law. It merely substituted elasticity of procedure for out moded rigidity, procedure representative of the practice of the Courts in interpreting powers of withdrawal and applying them to varying states of fact, having in mind the members' contract one with the other.

One has only to read the opinion of Justice Roberts in *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, 56 Sup. Ct. Rep. 408 to see how different the Act there under consideration was from the New Jersey Act. There for instance the application of 50% of receipts to withdrawing shareholders was abolished and the amount to be allocated left to directorate discretion—here the 50% provision was retained in the new act and absolute directorate discretion is not conferred. Nor does the provision exist in our Act taking from withdrawing members, receipts earmarked for them and devoting such receipts to the making of new loans, payment of old and new debts, payment of dividends and the creation of reserves for dividends. No such diversion is found in the New Jersey Act.

Chapter 102, Laws 1932 and the other building and loan legislation of that year saved thousands of homes and excepf for it infinitely more than $90,000,000 from the H. O. L. C. must have been needed in New Jersey to steady its mortgage market.

The purpose was public; the end adequate and the statute fairly within the reasoning of the Blaisdell case. As there the *quantum* remained the same and the effect of the legislation was to give the mortgaee about what he could have received had he foreclosed and taken over the property or become a mortgagee in possession. Appellant's interest remained constant, the assets of his Association were protected against sacrificial sale and he was entitled to at least as much as if the Association had gone into liquidation, as it must have done had it recognized the preferential rights of 1925.

Moreover, Appellant's Membership Contract Was Not Impaired.

Those who for the first time in 1903 sponsored the method of withdrawal regulation reflected in Sections 49 and 52, Chapter 65, Laws 1925, were experimenting—they probably never conceived of a situation such as confronted the movement from 1930 on. They were thinking in terms of curbing management against undue and unreasonable withholding of withdrawals. The experience with the contractual system was very fresh in the minds of the sponsors of the new and remediable system of control. They never considered that a means of protecting the shareholder against the management would become a weapon of discrimination and preference and a danger to the movement as a whole. Consequently they did not expressly legislate to cover a situation that they could not foresee or perhaps that they did not think was possible.

Nevertheless because of the ambiguity of the language used and more so because of the contract between member and member, whereby all agreed to participate proportionately in profits and losses and not to overreach one another, our Courts through the late Chief Justice Gummere and other judges construed the 1925 Act as impliedly forbidding recovery by a withdrawing shareholder where it appeared that payment to him would reduce materially the value of the shares of his fellow members, create preference and discrimination and result in an illegal distribution of the assets of the Association. *Richmond* v. *Hercules B. & L. Association* (Docket 58, p. 132) and other unreported cases described, commented upon and followed in *Fornatoro* v. *Atlantic Coast Building & Loan Association,* 10 N. J. Misc. Rep. 1248, 1254; 163 Atl. 240, *Rocker* v. *Cardinal B. & L. Association,* 13 N. J. Misc. Rep. 397 at 403.

Also even where recovery was had in such withdrawal suits the accepted practice was to control execution so that one shareholder might not injure his fellow member. Justice Kephart in *Stone* v. *New Schiller B. & L. Ass'n*, 153 Atl. Rep. 758, page 760, well expresses the situation:

> "Solvency in connection with a building and loan association is not a matter of bookkeeping but of sound business judgment. Where an association is insolvent, as that term is generally understood, or where a succession of withdrawals would precipitate insolvency, or have a strong tendency to do so, a judgment should not be entered in an action by a withdrawing member. A judgment under such circumstances would not be effective. See Christian's Appeal, *supra;* National Savings Loan & Building Association, 9 Wkly. Notes Cas. 79. If a shareholder wishes to force further liquidation, it should be through the proper authorities. Where an investment in a building and loan association turns out to be doubtful and the directors, by careful and prudent management, can save the venture, or greatly minimize the loss, these officers should be given every opportunity to bring the matter to a successful conclusion. This is a fundamental idea of partnership. The difficulty with associations is not always brought on by mismanagement; more frequently it is a depressed real estate market, particularly in times of great economic depression, such as the present. A shareholder owes a duty to his fellow members of the so-called partnership to not place them as well as himself, in a position where unnecessary loss must be suffered. He should not embarrass the association by suit and judgment."

See also *Nice Ball Bearing Co.* v. *Mortgage B. & L. Association*, 310 Pa. 560, 166 Atl. 239.

And as we have herein shown upon insolvency or voluntary liquidation all preferences are levelled.

Thus appellant's rights under the Act of 1925 were by interpretation and practice of the Courts, not substantially different than those which the Legislature expressly legislated into existence. The difference does not justify the claim of impairment.

Indeed the Act of 1932 was an effort to state legislatively the interpretation and practice adopted by the Courts to avoid the injustice, destruction, discrimination, preference, inequity, and inequality of a literal, rigid, legalistic application of the Act of 1925.

Even under the Act of 1925, having in mind his contract with his fellow members the burden was upon appellant to allege and prove that the Association had ample funds on hand to pay appellant and capriciously and unreasonably withheld such funds.

This will be appreciated when it is noted that the limitation upon the required use of one-half of the Association receipts is only limited by the Act to a period of six months. Thereafter the implication is plain that a Court might command more if management is unreasonably failing to apply more. This being so what then becomes of the seeming automatic right to sue after six months non-payment. One seems to negate the other. Each, however, can be given life and that is the duty of the Court in construing the statute in the light of the rights of withdrawing, continuing and borrowing members one to another, the rights of all with the Association, the rights of the Association and the rights of the State. No suit may be maintained even after six months unless the management being able to apply more than one-half of the receipts is unreasonably and capriciously refusing to so apply. The statute contemplated not merely an Association solvent in the legal sense of the term as used with ref-

erence to building and loans but one operating normally and as a going concern. And one seeking relief thereunder must plead and prove that situation which under the statute as properly construed justifies the relief. This the appellant failed to do.

Heinbokel v. *National S. B. & L. Ass'n.*, 58 Minn. 340, 25 L. R. A. 215; *Ronca* v. *New York B. L. B. Co.* 84 N. Y. Supp. 879; *Stilwell* v. *Peoples B. L. & S. Ass'n.*, 57 P. (Utah) 14, 17; *Smith* v. *Reserve Fund B. & L. Ass'n.*, 156 Atl. (Pa.) 902; *Texas Homestead B. & L. Ass'n.* v. *Kerr*, 13 S. W. (Tex.) 1020; *Hoyt* v. *Harbor & Suburban B. & S. Assn.*, 197 N. Y. 113, 90 N. E. 349; *Maloney* v. *Real Estate B. & L. Ass'n.*, 57 Mo. App. 384.

Moreover, P. L. 1932, Chapter 102, did not invade any of the Constitutional rights of appellant upon which he relies in his Assignments but as has been hereinbefore shown was an Act by which he was legally governed in the exercise of his privilege of withdrawal, an Act to which his rights were subject and an Act adopted in the proper exercise of the State's police power.

We respectfully submit, therefore, that the appeal of appellant be dismissed.

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FRED G. STICKEL, JR.,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A Corporation,

Appellee-Respondent.

Appeal from the New Jersey Supreme Court.

BRIEF OF STATE OF NEW JERSEY

by

LOUIS A. REILLY, COMMISSIONER OF BANKING AND INSURANCE OF NEW JERSEY, AS *AMICUS CURIAE.*

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SUBJECT INDEX.

PAGE

BRIEF OF AMICUS CURIAE:

I. Preliminary 1

II. Argument 4

III. Conclusion 15

APPENDIX 16

TABLE OF CASES CITED.

Bucsi v. *Longworth Building and Loan Association*, 119 N. J. L. 120 ..... 4, 7, 9, 10, 11, 13

Costanzo v. *Tillinghast*, 287 U. S. 341 7

Hicklin v. *Coney*, 290 U. S. 169 8

Hopkins Federal Savings & Loan Ass'n v. *Cleary*, 296 U. S. 315 9

Hopper v. *Stack*, 69 N. J. L. 562 14

Intiso v. *Metropolitan Savings and Loan Ass'n*, 68 N. J. L. 588 8

May v. *Board of Commissioners*, 111 N. J. L. 166 7

Rocker v. *Cardinal Building & Loan Ass'n*, 119 N. J. L. 134 ..... 4, 5

St. John The Baptist Church v. *Gengor*, 121 N. J. Eq. 349 13

State v. *Sutton*, 83 N. J. L. 46, 87 N. J. L. 192, 244 U. S. 258 13

Treigle v. *Acme Homestead Association*, 297 U. S. 189 ..... 9, 15

Veix v. *Sixth Ward B. & L. Association*, 123 N. J. L. 356 3

Table of Statutes Cited.

	PAGE
Chapter 65, P. L. 1925, Section 49	2, 16
Chapter 65, P. L. 1925, Section 52	2, 3, 5, 6, 7, 8, 16
Chapter 102, P. L. 1932	4, 5, 6, 10, 11, 17
Revised Statutes, 1:1-11	3, 18
Revised Statutes, 17:12-65	1, 20
Revised Statutes, 17:12-67	1, 20
Revised Statutes, 17:12-53	3, 18

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A Corporation,

Appellee-Respondent.

BRIEF OF STATE OF NEW JERSEY,

as *amicus curiae*.

I.

Preliminary Statement.

These proceedings seek to test the constitutionality of a statute which governs the relationship between building and loan associations of the State of New Jersey and their members in respect to withdrawals of shares. The Commissioner of Banking and Insurance of New Jersey is charged by law with the duty of supervision over such associations. Revised Statutes, Title 17, Chapter 12. Where it appears to him that an association is in an unsafe or unsound condition, or that it is unsafe or inexpedient for it to continue business, he may take possession of its business and affairs. R. S. 17:12-65; 17:12-67. Reversal of the decision of the court below will cause a complete change in the standards applied by the Commissioner in determining his course of conduct in respect to a particular association.

Since, as of December, 1938, (the most recent date for which figures are available) there were 1327 associations in New Jersey, having 793,091 members, with investments aggregating $1,034,000,011.00 the interest of the State in the present litigation is readily apparent. (Report of the Commissioner of Banking and Insurance to the Legislature of New Jersey as of December 21, 1938). It is for this reason that this brief is presented to the Court in the name of the State of New Jersey as *amicus curiae.*

The enactment, in 1937, of a revision of all the statutory law of ageneral nature in effect in the State of New Jersey has resulted in an apparent confusion which requires some clarification.

At the time the plaintiff below became a member of the respondent association, the respondent was governed by the provisions of an act of the New Jersey legislature entitled "An Act concerning building and loan associations" (Revision of 1925), Chapter 65, Laws of 1925. That act provided, among other things, that—

> "* * * nine or more persons * * * may become an incorporated association for the purpose of assisting each other * * * in acquiring real estate * * * and for the further purpose of accumulating a fund, to be repaid to its members, subject to the right of earlier redemption * * * when the funds of such association shall amount to a certain sum per share, to be specified in the certificate of incorporation." P. L. 1925, Chapter 65, Section 1, p. 189.

The "earlier redemption" referred to in Section 1 was clarified by Sections 49 and 52, as follows:—

> "The shares of every such association of this State * * * may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to ex-

ceed thirty days * * *." P. L. 1925, Chapter 65, Section 49, page 211.

"Withdrawals from any such association shall be paid in the order in which notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal." P. L. 1925, Chapter 65, Section 52, page 212.

In 1932, and again in 1935 and 1936, Section 52 of Chapter 65, P. L. 1925 was amended. In 1937, a complete revision of all the statute laws of the State of New Jersey of a general and permanent nature was enacted, and all prior laws repealed. P. L. 1937, Chapter 188. Vested rights were, of course, saved. R. S. 1:1-11.

Section 52 of Chapter 65, P. L. 1925, as amended in 1932, 1935 and 1936 was carried into the Revised Statutes, and now appears as R. S. 17:12-53.

The answer of the respondent, the defendant below, pleaded the provisions of R. S. 17:12-53 in defense to the action (Record; Page 5). Despite this, however, the issue seems to have been submitted by the parties upon the basis of Chapter 102, P. L. 1932, and seems so to have been decided by the Court below. See *Veix* v. *Sixth Ward Building and Loan Association* 123 N. J. L. 356, 357, where the Court says, (Record, page 13),

"The plaintiff-appellant says that the 1932 statute is invalid and the burden of the argument is that that statute is unconstitutional because it impairs the obligation of the contract, but we have already held to the contrary in the case of *Bucsi* v. *Longworth Building and Loan Association* 119 N. J. L. 120, and *Rocker* v. *Cardinal Building and Loan Association* 119 *Id.* 134, and this appeal is entirely controlled by our holding in those cases."

For the reasons stated, this brief will concern itself solely with the question of the constitutionality of Chapter 102, Laws of 1932.

II.

ARGUMENT.

Chapter 102, Laws of 1932 of the Laws of New Jersey is a valid enactment, and within the constitutional powers of the Legislature of the State of New Jersey to enact.

Before presentation of argument, it is essential that the status of the appellant as a member of the respondent be clarified. The appellant subscribed for and is now the holder of what, at issue, were known as "paid-up" shares, defined as "shares the maturity value of which shall be paid in advance." Chapter 65, P. L. 1925, Section 73, page 223. By Section 5 of Chapter 65, P. L. 1925, page 191, it was provided that—"The members or shareholders of any such association shall be those to whom its shares shall be issued • • •." Section 74 provided that "all members shall occupy the same relative status as to debts and losses of such association," and that "paid-up shares shall only be surrendered and withdrawn on the same terms and under

the same conditions as provided in the constitution for the surrender and withdrawal of installment shares * * *." Section 5 provided that "when shares mature and are paid, the subscribers thereto or owners thereof shall cease to be members * * *."

The status of the appellant as a member was, therefore, the same as that of any other member of the respondent. His holding of paid-up shares gave him no preference or priority of withdrawal: *Rocker* v. *Cardinal B. & L. Ass'n.*, 119 N. J. L. 134.

The complaint discloses that the appellant subscribed for shares upon two separate dates: October 1, 1928 and October 2, 1929 (Record, pages 1 and 4). At that time, the conditions precedent to withdrawal were those already noted. In August, 1932, appellant filed notice of withdrawal (Record, page 2). In the interim, on April 28, 1932, Chapter 102, Laws of 1932, became effective. The provisions of both enactments are set forth in full at other points in this brief, but for convenience of comparison, a synopsis in parallel columns is here given, insofar as the provisions are deemed material:

Ch. 65, P. L. 1925, Sec. 52.	Ch. 102, P. L. 1932.
1. Withdrawals shall be paid in the order in which notices thereof shall have been received.	1. Identical provision.
2. Not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until	2. Identical provision; adds a definition of what shall constitute monthly receipts.

Ch. 65, P. L. 1925, Sec. 52.	Ch. 102, P. L. 1932.
3. The oldest of such claims then unpaid shall have been on file for a period of six months; in no case shall payment be postponed for more than six months.	3. Provision eliminated.
4. No similar provision.	4. Where fund available for payment of withdrawals is insufficient to pay all withdrawals, priority of payment of any one member shall be to the extent of $500.00 to each member in order of priority until fund is exhausted.
5. No similar provision.	5. No withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity.
6. Members may sue and recover the withdrawal value of shares if payment is not made in six months of giving notice of withdrawal.	6. Provision eliminated. No member may sue to recover withdrawal value so long as funds are disbursed as in the act directed.

The appellant contends that, by reason of the changes in the statute, he has been deprived of property without due process of law, the obligation of a contract made by him has been impaired, and he has been deprived of the equal protection of the laws, all contrary to the provisions of the Constitution of the United States, and its Amendments.

Whether, however, withdrawal is an absolute right or a qualified privilege is by no means clear. Section 52 of Chapter 65, Laws of 1925 appears unambiguous upon its face. Standing alone, it apparently confers an absolute right to sue upon the expiration of six months from the date of demand for withdrawal. But it is elementary that, in construing statutes, the Court will not look only to a particular clause, but will consider the entire enactment, in order to ascertain the intention of the legislature. *Costanzo* v. *Tillinghast*, 287 U. S. 341; 77 L. ed. 350; *May* v. *Board of Commissioners*, 111 N. J. L. 166. The particular provision must, therefore, be read in the light of the entire statute, and must be so construed that it will harmonize with the intention of the legislature as expressed in the entire act.

The New Jersey Court of Errors and Appeals has not been silent upon the relationship between Chapter 65, Laws of 1925 as a whole and the provisions of Section 52. In *Bucsi* v. *Longworth B. & L. Ass'n.*, 119 N. J. L. 120, the Court said (p. 125):

> "But the statutory right of a member to withdraw from membership and to receive the withdrawal value of his shares and the statutory privilege to sue for the amount if not paid within the time named in the statute, is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and the statute does not contemplate that the privileges named shall be exercised to defeat equal participation, but that the spirit of the statute being equal participation, the paramount equity is equal participation at all times."

When it is remembered that termination of membership came not upon demand for withdrawal, or upon the expiration of six months from demand for withdrawal, but upon

payment to the member (Chapter 65, P. L. 1925, Section 5, *supra*), and that, by preexisting law, all members were on a parity as to debts and losses, the provisions of the withdrawal sections of the statute assume their true significance, and the full force of the language last quoted becomes apparent. *The privilege of suit conferred by Section 52, Chapter 65, P. L. 1925, is modified by the qualification that it may be exercised by a member only so long as it does not defeat or destroy that fundamental mutuality which is the entire basis for the relationship of members between themselves.* The 1932 amendment against which the present attack is made, effected no change in fundamental relationships. The incidents of membership were the same before and after the amendment, which was no more than legislative recognition and sanction of the situation that had theretofore obtained.

It must be remembered too, that Section 52 of Chapter 65, P. L. 1925 indicated the fund from which withdrawal demands were to be paid. Where such a fund is indicated, and judgment is entered, execution will be controlled to permit satisfaction from that fund only. Compare *Intiso* v. *Metropolitan Savings and Loan Association*, 68 N. J. L. 588 (a case which arose prior to the enactment of the statutes here discussed). See also annotation in 98 A. L. R. at page 99.

Under the circumstances, a conclusion that Section 52, Chapter 65, P. L. 1925 did not confer an absolute, or inalienable vested right to bring suit for the withdrawal value of shares is altogether reasonable. The Court of Errors and Appeals of New Jersey could justifiably have based its conclusions upon that ground, in which event its decision upon the force and effect of the statute would be final. *Hicklin* v. *Coney*, 290 U. S. 169, 78 L. ed. 247. But, while noting the interdependence of the various sections

of the act, and while commenting upon the conditional and qualified nature of the withdrawal right (*Bucsi* v. *Longworth B. & L. Ass'n, supra,* at page 125), the Court chose to consider the constitutional questions involved. It is submitted, however, that there is a sufficient non-federal ground for supporting the decision of the Court below.

B.

Assuming that the right to withdraw is a vested right, it by no means follows that the legislation subsequently enacted cannot lawfully affect it.

Building and loan associations are quasi-public in nature and are affected with a public interest. *Bucsi* v. *Longworth B. & L. Ass'n, supra; Hopkins Federal Savings and Loan Association* v. *Cleary,* 296 U. S. 315, 80 L. ed. 251; *Treigle* v. *Acme Homestead Association,* 297 U. S. 189, 80 L. ed. 575. As such, they are subject to a degree of regulation and supervision which would be unnecessary and unreasonable in the case of a purely private corporation. *Treigle* v. *Acme Homestead Association, supra.* The field within which the legislature may lawfully move in affecting contracts made with such institutions has been marked out by this Court. In *Treigle* v. *Acme Homestead Association, supra,* it was said (80 L. ed. at page 580),—

> "* * * we recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonable connected with the public interest as distinguished from purely private rights. The legislature has no greater power to interfere with the private contracts of such

corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, *it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive* * * *." (Italics supplied.)

It is submitted that the purpose of Chapter 102, P. L. 1932 is, in fact, public; that the means adopted to achieve that purpose are reasonable; and that its provisions are neither arbitrary nor oppressive.

A full discussion of the end sought to be achieved by the enactment of the statute may be found in *Bucsi* v. *Longworth B. & L. Ass'n, supra.* The Court there notices judicially the huge sums of money invested in and by building and loan associations of this State. Forced liquidation, the inevitable consequence of an unfettered right to bring suit for withdrawals, would further depress an already seriously depressed real estate and financial market. The Court says (*Bucsi* v. *Longworth B. & L. Ass'n, supra,* at pages 129 and 130):—

"* * * Mere contemplation of such a situation forces the conclusion that there was a tremendous and grave public interest involved. As long as the privilege of suit was unabridged potential insolvency was present as to many and actual insolvency of most necessarily would follow as a matter of course.

The liquidation of the assets of these associations having a value of approximately one billion dollars would have destroyed the stability of and the market for first mortgages on real estate and other types

of investment that are prescribed as legal investments by statute for banks, trust companies, insurance companies and other institutions and fiduciaries and to which classes of legal investments the funds of building and loan associations are restricted by law.

The value of real property and real estate mortgages was largely gone for the time being and liquidation could only be had on ruinous terms, but the values were susceptible of ultimate return. The result would be chaos and even under orderly liquidation of this vast amount of assets the ultimate return of these values would be indefinitely postponed if not irreparably impaired. The state has an important interest in the maintenance of real estate values from the major base upon which its tax structure and its various political subdivisions rests. The stability of the tax base over a term of years is vitally important to the state.

The structure of the tax base and the widespread membership in building and loan associations and the fact that the value of the real estate mortgages and real property owned by such association represents a high percentage of the total value of all taxable real estate in the state, *creates a situation which is peculiar to this state* * * *." (Italics supplied.)

The graphic word picture painted by the Chancellor concludes, it is submitted, any inquiry whatsoever into the object sought to be achieved by the provisions of Chapter 102, P. L. 1932. There can be no doubt that the act was passed for an end which was and is, in fact, public; the preservation of financial institutions the collapse of which would bring ruin upon the State.

It is further submitted that the means adopted to achieve that end are reasonably adapted to its accomplishment. Building and Loan associations have virtually no creditor obligations. *Bucsi* v. *Longworth B. & L. Ass'n,*

supra, at page 128. The only source of the threat to the public interest reviewed by Chancellor Campbell in the *Bucsi* case (cited at length, ante) lay in the members of associations themselves. They had within them the power to cause the catastrophe which the statute sought to prevent, possessing, as they did, the right to sue. *A modification of the power to sue was not only the most reasonable means, but the only effective means of accomplishing the purpose of the statute.* It is difficult to conceive what other means could have been adopted without serious disruption of the economic forces of the State, with the consequent social repercussions.

The quality of reasonableness is susceptible of further demonstration. *The right to sue is not irrevocably lost. It is deferred or postponed.* The device not only prevents public catastrophe, but preserves the mutual rights of withdrawing members as between themselves. One-half the monthly receipts are still available for distribution to withdrawing members. It is true that priority of payment to any one withdrawing member, is limited to $500.00 in any one month, where funds are not available for satisfaction of withdrawal demands in full. But it is submitted that one who has entered upon a mutual undertaking, such as membership in a building and loan association, cannot be heard to complain that he is not permitted to secure an advantage over other members similarly placed. It is further submitted that, where a billion dollars is involved (*Bucsi* v. *Longworth B. & L. Ass'n*, *supra*, at p. 127), it is in the interest of the State that the distribution of the fund be as widespread as possible, in order that a maximum sum be freed to circulate in currency. Rotation of payment, as provided by Chapter 102, P. L. 1932, effects a wider distribution of money available for employment in purchases.

There remain for consideration two aspects of Chapter 102, P. L. 1932. Whether preferment of matured shares over withdrawal demands is reasonably adapted to a public end, or whether private rights only are affected, is debatable. The statute has been found to be free of arbitrariness on this ground by the Court of Errors and Appeals of New Jersey. *Bucsi* v. *Longworth B. & L. Ass'n, supra; Rocker* v. *Cardinal B. & L. Ass'n,* 119 N. J. L. 134. Should this Court determine that it is not bound by that decision in this regard, it is submitted that the appellant, not having shown that the particular provision has been invoked to his prejudice, may not raise the point here. The consideration of the constitutionality of a statute will be limited by the exact case presented. *State* v. *Sutton,* 83 N. J. L. 46; *affirmed* 87 N. J. L. 192, 244 U. S. 258, 61 L. ed. 1117. Whether any shares matured and were paid in preference to the appellant's demands, does not appear. Furthermore, the invalidity of the particular provision need not affect the constitutionality of the entire act of 1932. The law is clearly established in New Jersey that, "where the principal object of the statute is constitutional, and the objectionable feature can be excised without substantial impairment of the general purpose, the statute is operative except in so far as it may contravene fundamental law." *St. John The Baptist, etc., Church* v. *Genor,* 121 N. J. Eq. 349, 357, citing numerous cases. It has already been demonstrated that the principal object of Chapter 102, P. L. 1932, is constitutional. The provision preferring holders of matured shares over withdrawing members may be, if objectionable, excised from the act without impairment of the general purpose. The possibility of such excision is susceptible of conclusive demonstration, for the reason that, subsequent to 1932, the particular provision was eliminated by the legislature by amendment, and the law, as it now stands, may

be found in R. S. 17:12-53. The building and loan association structure, as it exists in New Jersey, may be preserved through the medium of modifying the right to sue, without preferring any class of members over another class. In view of the law of the State of New Jersey, there is no foundation for invalidating the entire act should the particular provision be held invalid.

Chapter 102, Laws of 1932, contains a definition of the word "receipts". The prior law (Section 52, Chapter 65, P. L. 1925) contained no such definition. It is obvious that, if the total receipts were to be applied in satisfaction of withdrawal demands, associations would soon find themselves in a position where they would be without funds to carry on normal business operations. It would be impossible to reserve against contingencies. No funds would be available for the payment of taxes on property acquired. The definition includes what normally accounts for the greater part of monthly receipts, and what would normally be sufficient to pay withdrawal demands. There is, furthermore, no hint or suggestion in the record that the definition of the word "receipts" has resulted in prejudice to the appellant, or to any other member of the respondent. There is, in New Jersey, a strong presumption in support of the constitutionality of an act of the legislature. That presumption must be rebutted by evidence adduced by the party attacking the statute. See *Hopper* v. *Stack*, 69 N. J. L. 562. In the absence of such evidence, the presumption in favor of the act must stand. And since the record here is barren of any facts in opposition to the presumption, the point of attack may not be maintained. It is submitted that the definition, as enacted in Chapter 102, P. L. 1932, violates no law, and infringes upon no right of the appellant.

It is further submitted that, for the reasons already stated, the case now before this Court is clearly distinguishable from *Treigle* v. *Acme Homestead Association, supra.* The challenged provisions, unlike those of the Louisiana statute, are clearly intended to preserve the assets of the association. They are calculated to preserve solvency, and to protect the interests of continuing and withdrawing members. They are consistent with the fundamental building and loan association concept; namely, mutuality.

Conclusion.

It is respectfully submitted that, for the reasons herein stated, the judgment of the Court below should be affirmed.

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Appendix.

CHAPTER 65, LAWS OF 1925

Section 49

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section.

CHAPTER 65, LAWS OF 1925

Section 52

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any

court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal.

CHAPTER 102, LAWS OF 1932

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income or investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment

prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

2. This act shall take effect immediately.

Approved April 22, 1932.

R. S. 1: 1-11

The repeal, by the enactment of the Revised Statutes of any act or part of any act, shall not in any way affect, impair or invalidate any act done or right or limitation vested or accrued, or any bonds issued, or taxes or assessments of any kind levied or imposed, or any tax sale had, or in any way annul, invalidate, take away, impair, limit, disturb or affect any right, title, estate, privilege, immunity or power or conveyance in, to or of either real or personal property, acquired, given, conferred, had or made under or by virtue of, or validated by, any act or part of any act so repealed.

R. S. 17: 12-53

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net

receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean the moneys, other than borrowed moneys, received by any such association less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made avaliable for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and, in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

f. The board of directors of any such association shall have the right, in its discretion, to make available additional funds other than those required in paragraph "e" of this section for the payment of maturities and withdrawals; but no more than one-third of the net receipts as defined in said paragraph "e" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid.

R. S. 17: 12-67

The commissioner may forthwith take possession of the property and business of the association and retain such possession until the property and business of the association shall be returned to the management of its board of directors, or its affairs be finally liquidated as herein provided. On taking possession of the property and business of any such association, the commissioner may continue the operation of the business of the association until its property and business shall be returned to the management of the board of directors of the association, or such association shall merge or consolidate with another association, or until liquidation of the association shall commence, as hereinafter provided.

R. S. 17: 12-65

When it appears to the commissioner that the interests of the creditors or shareholders of an association are being jeopardized because the association has violated its charter or a law of this state, or is conducting its business in an unsafe or unauthorized manner, or if the association re-

fuses to submit its books, papers and concerns to the inspection of the commissioner or an examiner appointed by him, or if an officer or director refuses to be examined on oath regarding the affairs of the association, or if the association suspends payment of its obligations, or, if an examination or report provided for by this chapter, the commissioner has reason to conclude that the association is in an unsound or unsafe condition to transact business, or that it is insolvent, or that it is unsafe or inexpedient for it to continue business, or if the association neglects or refuses to observe an order of the commissioner issued pursuant to section 17:12-64 of this title, he may, if the association is of another state, revoke and cancel its authority to do business in this state, and if the association is incorporated under the laws of this state, proceed in the manner provided by sections 17:12-66 to 17:12-80 of this title.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF ON BEHALF OF THE UNITED STATES SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE.

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INDEX.

PAGE

Motion:

Motion for leave to file brief as Amicus Curiae 1
Consent of Attorney for Appellant and Appellee to filing of brief as Amicus Curiae 3
Order granting motion to file brief as Amicus Curiae 3

Brief:

Statement 4
Opinion below 6
Statutes involved 6
Question presented 8

Argument:

Point I 10

Building and loan associations, like banks and insurance companies, are quasi-public corporations affected with a public interest and are subject to the police power. Building and loan associations, being subject to the police power, may be reasonably regulated and controlled by legislative action.

Point II 13

The relationship between building and loan associations and their members is entered into subject to the future exercise of the police power of the State by the enactment of reasonable laws for the common good.

Point III 21

The changes in the withdrawal rights of shareholders made by Act 102 of the Laws of 1932 Constitute a reasonable and proper exercise of the police power. Such changes are not discriminatory, arbitrary or capricious, but bear a reasonable relation to a legitimate end.

Point IV 27

Act 102 changes only the remedy or procedure for enforcing contracts, and not substantive rights under the contract. Courts uniformly hold that changes in remedy do not impair obligation of contract.

Point V 29

Facts and law involved in *Treigle* v. *Acme Homestead Ass'n* case are distinguished from those in present case.

INDEX OF CASES.

Antoni v. Greenbow, 107 U. S. 769, 775 28
Bank of Oxford v. Love, 250 U. S. 603 (1919) 14
Bibbs County Loan Association v. Richards, 21 Ga. 592, 595, 596 12
Bloch v. Bell Furniture Co., 111 N. J. Eq. 551, 561, 162 A. 414, 84 A. L. R. 885 24
Boston Beer Co. v. Massachusetts, 97 U. S. 25 (1878) .. 13
Bucsi v. Longworth Building and Loan Association, 119 N. J. L. 120, 194 A. 857 (1937) 9, 22, 32
Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 580 (1885) 14
Dartmouth College v. Woodward, 4 Wheat. 518, 666-672 11
Dillingham v. McLaughlin, 264 U. S. 370 (1923) 18
First National Bank v. County of Dawson, 66 Mont. 321, 213 P. 1097 (1923) 12
Fornataro v. Atlantic Coast Building and Loan Association, 10 N. J. Misc. 1248, 163 A. 240 ..... 26, 32
Henderson Co. v. Thompson, et al., 300 U. S. 258 (1937) 13
Holland v. Nakdimen, 177 Ark. 920, 9 S. W. 2d 307 (1928) 17
Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 (1934) 13, 14, 15, 25, 27, 31
Hopkins Federal Savings and Loan Association v. Cleary, 296 U. S. 315 (1935) 10
Horowitz v. Guaranty Building & Loan Ass'n. of the City of Newark, 17 N. J. Misc. 274, 8 A. 2d 768 26
Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922) 14
Liggett Co. v. Lee, 288 U. S. 517, 548, et seq. 11
Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32 (1928) 11

Louisville and Nashville v. Mottley, 219 U. S. 467 (1910) 15
Manigault v. Springs, 199 U. S. 473 (1905) 13
Miller v. Prudential Banking and Trust Co., 63 W. Va. 107, 110, 59 S. E. 977 (1907) 12
Mutual Building and Savings Association v. Wilkinson, 8 F. (2d) 183, Affirmed, 13 F. (2) 997, 998 (1926) 12
National Safe Deposit Co. v. Stead, 232 U. S. 58 (1914) 14
Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 31
New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567 (1894) 14
Osborn v. Nicholson, 13 Wall. 654 (1872) 13
Prudential Bldg. & Loan Ass'n. v. Shaw, 119 Tex. 228, 26 S. W. (2d) 168 (1930) 12
Rast v. Van Deman & L. Co., 240 U. S. 342 (1916) 13
Rocker v. Cardinal Building and Loan Association, 13 N. J. Misc. 397, 197 A. 667, Aff'd. 119 N. J. L. 134, 194 A. 865 ..... 9, 22, 27, 32
Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608 (1935) 14
State ex rel. Crabbe, Atty. Gen., v. Massillon Savings and Loan Co., 110 Ohio St. 320, 143 N. E. 894 (1924) .. 12, 19
State ex rel. Wagner, Sup'r v. Farm and Home Savings and Loan Association of Missouri, 90 S. W. 2d 93 (Supreme Court of Missouri, 1936) 26, 32
Stockton v. Mechanics' & Laborers' Savings Bank, 32 N. J. Eq. 163, 168, 169 24
Stone v. Mississippi ex rel. Harris, 101 U. S. 814 (1880) 13
Treigle v. Acme Homestead Association, 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284 (1935) 29, 31, 33

Union Savings and Investment Company v. Salt Lake County, 44 Utah 397, 140 P. 221 (1914) 12

United States v. Cambridge Loan and Building Company, 278 U. S. 55 (1928) 11

Usher v. Sarco Co., etc., 100 N. J. Eq. 428, 431, 136 A. 199 24

West Coast Hotel Company v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned moves for permission to file in this cause the following brief as *Amicus Curiae* in behalf of the United States Savings and Loan League.

The controlling question involved in this case is whether the Legislature of the State of New Jersey may, in the exercise of its police power, make reasonable changes in the withdrawal rights of shareholders in State-chartered building and loan associations; and whether Chapter 102, Laws of 1932 is a reasonable exercise of such powers. The New Jersey Court of Errors and Appeals has so held and

the appellant in this cause has brought the case to this Court for review.

The United States Savings and Loan Leagues, in whose behalf this brief is filed, is a National organization whose membership is composed of the State Leagues of forty-eight States and Hawaii and individual building and loan and savings and loan associations.

The withdrawal right and its proper limitation are of the essence of the relationship between these associations and their shareholders. A decision by this Court on the questions presented in the above case will vitally affect the interests of building and loan and savings and loan associations located in at least twenty states, which enacted statutes regulating withdrawals from such associations, during the depression years of 1931 to 1935, as well as the business of all associations and their shareholders to some extent.

Due to the fact that this case, when decided, will have such a far reaching effect on building and loan and savings and loan associations and the withdrawal rights of shareholders in such associations, the United States Savings and Loan League wishes to present its views in connection with the determination of the issues involved. The undersigned therefore requests that the Court permit him to file the following brief as *Amicus Curiae* in the above entitled matter.

The attorneys for the appellant and the appellee have consented in writing to the filing of a brief by the undersigned.

.....

Attorney at Law.

January ....., 1940.

Consent of Attorneys for Appellant and Appellee to the Filing of Brief as Amicus Curiae.

We consent to the making of the above motion and the entering of the following order.

.....

Attorney for Appellant.

.....

Attorney for Appellee.

....., 1940.

Order Granting Motion to File Brief as Amicus Curiae.

The foregoing motion is allowed and it is ordered that the brief be filed.

.....

....., 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 567.

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF ON BEHALF OF THE UNITED STATES SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE.

STATEMENT.

The appellant attacks Chapter 102, New Jersey Laws 1932, on the ground of impairment of contract and deprivation of property without due process of law. The chapter under attack changes the time and method of payment of withdrawals in New Jersey associations and prohibits suits from being brought as long as an association follows the prescribed procedure.

This brief, filed on behalf of the United States Savings and Loan League, is presented because the withdrawal right and its proper limitation are of the essence of the relationship between these associations and their shareholders, and because a determination of the question here under consideration will affect the interests of building and loan and savings and loan associations located in at least twenty States, which enacted statutes regulating withdrawals from such associations during the depression years of 1931 to 1935 in order to prevent the utter collapse of these associations.

See *Alabama:* Act of 1927, pages 431-432—1928 Code, Sec. 7097; New Code P. L. 1931, 1932 amendment of the Code, pages 232-233, Section 7111(33); Laws of 1932, Act No. 119, approved October 22, 1932; *California:* G. L. 1931, Act. 986, p. 457 (New Code); Laws 1933, C. 4; *Colorado:* P. L. 1933, Chap. 47, p. 284, Article V, Sec. 5; *Florida:* P. L. 1931, Chap. 15606 (No. 5), page 1050; P. L. 1933, Chap. 15908 (No. 51), page 111; *Illinois:* Laws 1931-1932 First Sp. Sess., p. 28; Laws 1933, p. 304; Laws 1935, p. 570; *Iowa:* Laws 1933, C. 165; *Kentucky:* Laws 1934, C. 18; *Louisiana:* Laws 1932, Act 140; *Massachusetts:* G. L. 1932, C. 170, Sec. 16, p. 2240; Laws 1933, C. 144, Sec. 17, p. 178; *Michigan:* L. 1931, Act 135; L. 1932, Act 20, p. 35, Sec. 6; Laws 1933, Act 120, p. 164; Laws 1933, extra session, Act 14, p. 40; *Nevada:* Laws 1931, C. 51; New Code—Section 12; L. 1933, C. 68; *New York:* Laws 1933, C. 325; *North Carolina:* L. 1933, C. 122, p. 93; *North Dakota:* Laws 1931, C. 94, New Code, Sec. 8; Laws 1933, C. 78, p. 109; *Ohio:* Laws 1934, S. 1, 3d, s. ses., Baldwin's 1934 Revision of Throckmorton's Annotated Code of Ohio, Sec. 9651, p. 1098; *Oklahoma:* St. 1931, C. 46, Art. 8, Sec. 9800; Laws 1933, C. 54; *Tennessee:* Laws 1933, C. 19, Sec. 7; *Texas:* Laws 1932, C. 18, 42nd Legislature, 3d called Session, p. 41; *Washington:* Laws 1933,

C. 183, p. 711; *West Virginia:* Laws 1932, C. 58, p. 130, Sec. 12.

In addition, substantial changes were also made during the depression period in the laws of fourteen other States. See *Arizona:* P. L. 1931, C. 40, p. 82; *Connecticut:* L. 1933, C. 210; *Illinois:* 1933, Smith & Hurd Rev. Statutes, p. 786-7, Sec. 225; *Maine:* L. 1933, C. 30; *Maryland:* L. 1933, C. 47, p. 99; *New Mexico:* L. 1931, C. 147, L. 1933, C. 78; *Missouri:* 1931, Revised St., C. 35, p 141; L. 1933, p. 182, at 184, Sec. 5593; *Montana:* L. 1933, C. 11; *Oregon:* L. 1931, C. 373; L. 1933, C. 328; *Pennsylvania:* L. 1933, C. 108; L. 1933, C. 114; *Rhode Island:* L. 1931, C. 1796; *South Carolina:* L. 1933, Act 622, p. 1176; *Utah:* 1933, C. 7; *Virginia:* L. 1932, C. 102, p. 94; *Wisconsin:* L. 1931, C. 70; L. 1933, C. 372.

For a statement of the essential facts, the Court is respectfully referred to the Statement contained in the briefs of the appellant and the appellee.

Opinion Below.

The opinion of the New Jersey Court of Errors and Appeals in this case is reported at 123 N. J. L. 356.

Statutes Involved.

Section 52 of "an Act concerning building and loan associations, revision of 1925," being Pamph. L. 1925, c. 65; Comp. St. Supp. 1930, Sec. 27—R. (52) provided as follows:

> "52. *Payment of withdrawals.* Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then un-

paid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

Section 52 of "an Act concerning building and loan associations, revision of 1925," as amended by Pamph. L. 1932, c. 102; N. J. St. Annual 1932, Sec. 27—R. (52), effective April 22, 1932, provides as follows:

"52. *Payment of withdrawals.* Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one month the funds of the association required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the

funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity, and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein."

Question Presented.

The controlling question involved in this case is whether the Legislature of the State of New Jersey may, in the exercise of its police power, make reasonable changes in withdrawal rights of shareholders in State-chartered building and loan associations; and whether Chapter 102, Laws of 1932, which restricts payment of withdrawals in New Jersey associations and prohibits suits from being brought to recover the withdrawal value of shares as long as an association follows the prescribed procedure, is a reasonable exercise of such power. The New Jersey Court of Errors and Appeals has so held and the appellant in this cause has brought the case to this Court for review.

Appellant's contentions are (1) that the provisions of the above Act impaired the obligation of an existing share contract between the appellant and the appellees in violation of Article 1, Section 10 of the Constitution of the United States; deprived the appellant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and denied to the appellant the equal protection of the laws in violation of Section 1 of the Fourteenth

Amendment to the Constitution of the United States; (2) that the Act is therefore unconstitutional and void; and (3) that the New Jersey Court of Errors and Appeals therefore erred in confirming the judgment of the New Jersey Supreme Court which enforced the provisions of said Act.

The Court of Errors and Appeals of New Jersey based its decision in this case on the reasoning in the cases of *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120, 194 A. 857 (1937), and *Rocker* v. *Cardinal Building and Loan Association,* 13 N. J. Misc. 397, 197 A. 667, Aff'd. 119 N. J. L. 134, 194 A. 865, in which it had held that the 1932 legislation was a proper exercise of the paramount police power of the State and that, in the supervision and control of these institutions, the State cannot be stayed by the claims of individual shareholders that their preexisting rights and relationships in these associations will be incidentally affected and modified. Those cases present a notable statement of legal principles for which the United States Savings and Loan League has contended for many years.

ARGUMENT.

POINT I.

Building and Loan Associations, Like Banks and Insurance Companies, Are Quasi-Public Corporations Affected With a Public Interest and Are Subject to the Police Power. Building and Loan Associations, Being Subject to the Police Power, May Be Reasonably Regulated and Controlled by Legislative Action.

Building and loan and savings and loan associations are local, mutual, cooperative institutions organized for the purpose of inculcating the habits of thrift and aiding in the financing of home purchase and construction on the part of their members. Thompson, Building Associations, Secs. 23, 314 (2d ed. 1899); Thornton & Blackledge, Building Associations, Sec. 122 (2d ed. 1899). Because of their importance in developing habits of thrift and in increasing home ownership as well as building developments, these associations have been recognized as quasi-public in character and subject to greater Governmental supervision and control than ordinary private corporations.

The public character of these institutions was emphasized in a recent decision of this Court, *Hopkins Federal Savings and Loan Association* v. *Cleary*, 296 U. S. 315 (1935). In that case, Mr. Justice Cardozo, in holding invalid an Act of Congress which provided for the conversion of State-chartered building and loan associations into Federal savings and loan associations, said, *inter alia*, with respect to associations chartered by the State:

> "They are *quasi-public corporations*, chartered to encourage thrift and promote ownership of homes, with powers and immunities peculiarly their own. • • • They are more than business corporations.

> They have been organized and nutured as *quasi-public* instruments. * * * In its capacity of quasi-sovereign, the State repulses an assault upon the *quasi-public institutions* that are the products and embodiment of its statutes and its policies. * * * In the creation of corporations of this *quasi-public order* and in keeping them thereafter within the limits of their charters, the State is *parens patriae*, acting in a spirit of benevolence for the welfare of its citizens. * * * A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private, *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 666-672. Cf. the statutes and decisions collected by Brandeis, J. in *Liggett Co.* v. *Lee*, 288 U. S. 517, 548, *et seq.* This is true of building and loan associations in Wisconsin and in other States. They have been given corporate capacity in the belief that their creation will advance the common weal. The State, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as *quasi-public instruments.* * * * *How they shall be formed, how maintained and supervised, and how and when dissolved are matters of governmental policy.*" (Italics supplied.)

In *Louisville Gas and Electric Co.* v. *Coleman*, 277 U. S. 32 (1928), the United States Supreme Court, in holding valid, under the equal protection clause of the Constitution, a statutory provision which exempted building and loan associations from the operation of a Kentucky revenue act because of the quasi-public purposes which they served, said, at page 40:

> "It is made clear by the lower court that the purpose of the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the *quasi-public* purpose which the Legislature designed in providing for their creation." (Italics supplied.)

In *United States* v. *Cambridge Loan and Building Com-*

pany, 278 U. S. 55 (1928), the Supreme Court held in effect that building and loan associations did not lose their quasi-public character and right on that ground to be exempt from Federal corporate income taxation by reason of their acceptance of deposits from those not shareholders and their making loans to shareholders who had not subscribed for shares in an amount equivalent to the amount of their loan.

In *Union Savings and Investment Company* v. *Salt Lake County*, 44 Utah 397, 140 P. 221 (1914), the Court pointed out, in determining the point at issue, that, in view of the purpose of building and loan associations to enable a large number of persons who are without ready means to build homes, and the benefit to the community derived from such associations, the State had the right, under its police power, to exercise rights of inspection and supervision over such associations greater than over ordinary business corporations. See also *Prudential Bldg. & Loan Ass'n* v. *Shaw*, 119 Tex. 228, 26 S. W. (2d) 168 (1930); *State ex rel. Crabbe, Atty. Gen.* v. *Massillon Savings and Loan Co.*, 110 Ohio St. 320, 143 N. E. 894 (1924); *Mutual Building and Savings Association* v. *Wilkinson*, 8 F. (2d) 183, Affirmed 13 F. (2d) 997, 998 (1926); *First National Bank* v. *County of Dawson*, 66 Mont. 321, 213 P. 1097 (1923). Cf. *Miller* v. *Prudential Banking and Trust Co.*, 63 W. Va. 107, 110, 59 S. E. 977 (1907); *Bibbs County Loan Association* v. *Richards*, 21 Ga. 592, 595, 596.

Since it is clear from the above authorities that building and loan associations are quasi-public corporations affected with a public interest and are therefore subject to the police power, they may be reasonably regulated and controlled by legislative action.

Point II.

The Relationship Between Building and Loan Associations and Their Members Is Entered Into Subject to the Future Exercise of the Police Power of the State by the Enactment of Reasonable Laws for the Common Good.

Although it is true that paragraph 1, Section 10, Article I of the United States Constitution provides that, "No State shall * * * pass any * * * law impairing the obligation of contracts," this constitutional provision does not prevent a reasonable exercise of the police power of a State, *i. e.*, its power to legislate for the protection of the public health, public safety and public welfare. An able discussion of this general principle is contained in *Constitution of the United States of America* (United States Government Printing Office: 1938), as follows:

> "All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation. *Osborn* v. *Nicholson*, 13 Wall. 654 (1872). See also *Stone* v. *Mississippi ex rel. Harris*, 101 U. S. 814 (1880); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (1878). It does not matter that legislation appropriate to a legitimate end has the result of modifying or abrogating contracts already in effect, as contracts are to be regarded as having been made subject to the future exercise of constitutional power; the reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934). Parties entering into contracts do not estop the Legislature from enacting laws intended for the promotion of the common weal, or necessary for the general public good, even though contracts previously entered into between individuals may thereby be affected. *Manigault* v. *Springs*, 199 U. S. 473 (1905). * * * *Henderson Co.* v. *Thompson, et al.*, 300 U. S. 258 (1937).
>
> "Contracts made in the conduct of a business that is subject to regulation are also subject to such regulation. *Rast* v. *Van Deman & L. Co.*, 240 U. S. 342

(1916). For example, an act regulating dental advertising, where such regulation is a reasonable exercise of the protective power of the State, is valid even though it interferes with certain existing contracts for display signs and press notices. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935). And, an insurance company is subject to reasonable regulations prescribed by the Legislature, provided such regulations do not materially interfere with the substantial enjoyment of privileges granted by the State and serve only to secure the ends for which the corporation was created. *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 580 (1885). Similarly a State may establish such reasonable and general regulations of banks as may be essential to public safety, and enforce them through a board supported by moderate assessments against the bank, despite the fact that the charter of the bank had confided the control of the bank's business to its stockholders. *Bank of Oxford* v. *Love*, 250 U. S. 603 (1919). An inheritance tax statute which requires the sealing of safe deposit boxes for at least 10 days after the death of the renter and requires the deposit company to retain assets found therein sufficient to pay the tax due the State does not impair the company's charter power to do a safe deposit business. *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58 (1914).

• • •

"The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with existing contracts. A reasonable and valid exercise of a State's reserved power to protect the vital interests of the public during an economic emergency does not violate the contract clause of the Constitution. *Home Bldg. & Loan Assoc.* v. *Blaisdell*, 290 U. S. 398 (1934); *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 567 (1894). Similarly, emergency legislation relieving tenants from oppressive rental agreements is not invalid as an impairment of the obligation of contracts entered into under economic duress. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922)."

The most authoritative recent decision dealing with the power of the State to pass laws under its police power which

indirectly impair or regulate existing contracts or the remedy by which they are enforced is, of course, *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1933), which held valid a Minnesota statute extending the time allowed by existing law for redeeming real property from foreclosure and sale under existing mortgages. More will be said later about the analogy that can be drawn between the facts in that case and the present one.

One of the leading cases on this general subject, of course, is *Louisville and Nashville* v. *Mottley*, 219 U. S. 467 (1910), in which this Court dealt with the analogous subject as to whether an Act of Congress, otherwise constitutional, was unconstitutional under the Fifth Amendment as a taking of private property without compensation, because it invalidates contracts between individuals which conflict with the public policy declared in the Act. In that case, the Court held that a contract valid when made (in 1871) for the giving of a free pass by an interstate carrier, in consideration of a release of a claim for damages, could not be enforced after Congress had passed the Act of June 29, 1906, which prohibited carriers from charging a different rate from that specified in their published tariffs. The Court said:

> "It may be suggested that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. * * * The Court cannot mold a statute to meet its views of justice in a particular case. * * * It is said, however, that, as the contract of Mottley and wife was originally valid, it cannot be supposed that Congress intended by the Act of 1906 to annul or prevent its performance. * * * Assuming that the agreement of 1871 was valid when made, could Congress, by any statute subsequently enacted, make its enforcement by suit impossible? * * * Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a

contract can extend to the defeat of legitimate government authority. These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power * * * as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. * * * There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject-matter which exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority. * * * If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

In line with the above statement of the law and in line with the foregoing Court decisions, it has been the settled law of this country for many years that State Legislatures may enact statutes regulating banks, building and loan associations and insurance companies, in the interest of the public and of the general welfare of the State, although incidentally the private rights of said associations and of their members must be correspondingly altered and modified.

Such changes are in no manner a violation of the constitutional rights of the members, for the reason that, as pointed out above, the exercise of the police power, within its proper sphere, cannot be impeded by constitutional guarantees. When the Legislature has undertaken to regulate a business affected with a public interest, this exercise by the State of its basic police power in the interest of the

common weal cannot be arrested by the claim of individual contract or property rights. This basic principle of constitutional law, which is trite in respect to banks, public utilities, carriers and insurance companies, equally applies to building and loan associations, which are to an equal extent quasi-public institutions.

When private individuals acquire rights, by contract or otherwise, in such quasi-public institutions, subject to legislative regulation and control, such individuals cannot claim any constitutional privileges against the impairment of their relationships or their contracts by the subsequent enactment of regulatory legislation affecting such institutions through the proper exercise of the police power. This doctrine is inevitable and inherent in the nature of these institutions and necessarily results from their character. For it cannot be denied that, if their contracts or shareholder relationships were free from control or interference by the Legislature, the entire business could be put beyond the control of government regulation, by the simple expedient of making creditor or shareholder contracts.

In the case of *Holland* v. *Nakdimen*, 177 Ark. 920, 9 S. W. 2d 307 (1928), the Court held that a statute prescribing a maximum rate of interest to be allowed on deposits was a proper exercise of the power to regulate banks operating in that State. The decision points out that this statute not only operated to control the interest paid on future deposits, but applied to a previously existing contract by which a bank agreed to allow a higher rate of interest to one of its depositors. The Court said:

> "Finally, it is insisted that the act under consideration went into effect March 7, 1927, and that in so far as the plaintiff, Mrs. C. C. Scott, is concerned, it would violate a contract which the bank had previously made with her to pay her 4½ per cent on time deposits until June 30, 1927. When Mrs. Scott and the bank made this contract, they knew that the regulation and con-

trol of banks came under the internal police power of the State, and that this contract must be subject to all laws then in force or which might thereafter be passed."

Such a decision is direct authority for the proposition that no shareholder in a building and loan association can complain of a statute, enacted under the police power of the State, which affects his rights by providing for a new system of withdrawals from such association.

In *Dillingham* v. *McLaughlin*, 264 U. S. 370 (1923), some individuals, who operated as a common law trust, conducted a home building, thrift and savings business. They had received deposits under certificates which constituted valid and legal contracts under the laws of the State of New York. By a subsequent enactment, the Legislature provided that such businesses should be incorporated and classified with banks and building and loan associations, and should be subjected to the regulations applicable to such businesses. The individuals who operated the trust brought suit to restrain the enforcement of the Act. On appeal, this Court specifically held that the new enactment was not only valid but would apply to all existing contracts in the existing business, since the new statute was an exercise by the Legislature of the police power in a field undoubtedly within its proper sphere. As to the existing contracts, the Court said:

> "The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."

An important case, in one of the most important building and loan states, was recently decided by the Supreme Court of Ohio. The Massillon Building and Loan Association had made a contract, under which it had given to certain brokers the exclusive right to sell to the public twenty thousand shares of the capital stock of said Association.

The contract was an important one, involving more than Eighty Thousand Dollars in potenital profit to the brokers. The contract was entirely beneficial to the Association also, which collected on each sale a net amount in excess of the par value of its shares. The contract, when made, was, in every respect, legal and binding under the laws of the State of Ohio.

The Banking Commissioner of Ohio, however, did not approve the policy underlying the sales of shares made under this contract. There was, however, no law to which resort could be had in order to prevent the association and the brokers from going on with the execution of this contract. As a matter of fact, the contract had been to a substantial extent already executed, and, in every sense of the word, contract and property rights had vested in the parties, subject to the protection of all State and Federal constitutional guarantees.

At the suggestion and on the recommendation of the Banking Commissioner, the Legislature of Ohio enacted a law providing that all building and loan shares must be sold, by the associations respectively, directly to the public and "over the counter." This statute, in terms, was made retroactive, and all existing agreements in derogation thereof were declared to be illegal and null under the reserve police power and the right of the State of Ohio to control the operations and relationships of its building and loan associations. An excerpt from that decision, *State ex rel. Crabbe, Atty. Gen.* v. *Massillon Savings & Loan Co.*, 110 Ohio St. 320, 143 N. E. 894 (1924), reads:

> " 'By virtue of its police power, the State may regulate building and loan associations. * * * In the exercise of this power, various statutes have been passed relating, among other things, to the incorporation of such societies, to their powers.' etc., 9 Corpus Juris, 923. In this case the State seeks to oust the building and loan company from its claimed right or

franchise to sell its stock and memberships in contravention of the statute, after July 3, 1923. It is not our purpose to decide what the effect of this contract may be as between the parties themselves, especially as it has been suggested in argument that this feature has been adjudicated in another case. We are not advised by the record to what extent the contract between the building and loan company and the finance company had been executed by actual sales of stock and memberships prior to the filing of this petition in *quo warranto*. The petition merely asks for an ouster in the future from the claimed privilege of selling the same in accordance with the agreement. Therefore it is manifest that, while the petition attacks the contract entered into prior to the effective date of the amended act, and asks the judgment of ouster from further proceedings under that contract, it is not sought to impair a completed contractual obligation, but to curtail a subsequent exercise of a franchise by preventing future sales. Undoubtedly this association itself could not enter into such a contract after July 2, 1923, and, in our opinion, it cannot foreclose the right of the State to exercise thereafter its police power by entering into such contract prior to the date of the amended act."

Since building and loan associations are subject to regulation under the police power, their creditor—and shareholder—relationships are subject to reasonable control, as otherwise all power of State regulation and control would be frustrated by any pre-existing contracts, outstanding stock certificates, or other current undertakings, of said institutions. It is for that reason that the cases hold uniformly that the power of regulation or control over these institutions cannot be arrested or weakened or limited by the pre-existing contracts or shareholder relationships of these quasi-public corporations.

Accordingly, persons who make contracts with, or who subscribe to shares in building and loan associations are charged in advance with knowledge of the character of these institutions and of the regulatory rights of the Legislature

in their behalf, and such shareholders cannot validly complain when the Legislature at a later date exercises its right of reasonable control and regulation over them and effects structural and other changes which affect the pre-existing prerogatives and rights of these shareholders and members.

Point III.

The Changes in the Withdrawal Rights of Shareholders Made by Act 102 of the Laws of 1932 Constitute a Reasonable and Proper Exercise of the Police Power. Such Changes Are Not Discriminatory, Arbitrary or Capricious, But Bear a Reasonable Relation to a Legitimate End.

An analysis of the changes made by the amendment of 1932 discloses the following:

1. That prior to the amendment it was provided that withdrawals should be paid in the order in which the notices therefor were received; the amendment makes the same provision as to priority, but limits priority rights to payment out of funds allocated by the statute for that purpose.

2. That prior to the amendment, not more than one-half the receipts in any one month could be required to be used for payment of withdrawals without the consent of the board of directors until the oldest had been on file for six months, and thereafter all receipts were required to be used. Under the amendment, the funds required to be used for the payment of withdrawals are limited to one-half of the receipts in any month on income on investments authorized by Section 26 of the Act (Comp. St. Supp. Sec. 27-R. (26)), plus dues on shares pledged to secure loans, authorized by paragraphs II and V of said section, plus payment of loans authorized by said paragraph and section. The right of the board of directors to use receipts in excess of those required to be used for the payment of withdrawals still continues.

3. That prior to the amendment, Section 52 made no reference to matured shares, while the amendment provides that withdrawals shall not be paid if the funds

available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within prescribed times.

4. That prior to the amendment the act gave a right of action to a withdrawing member whose withdrawal was not paid within six months while the amendment prohibits a suit so long as the funds in the treasury of the association are applied as required by the statute.

The New Jersey Court of Errors and Appeals, in upholding the validity of these changes made by Act 102 in the instant case, which is reported at 123 N. J. L. 356, based its decision on the reasoning which it had previously followed in the cases of *Bucsi* v. *Longworth Building and Loan Association*, 119 N. J. L. 120, 194 A. 857 (1937) and *Rocker* v. *Cardinal Building and Loan Association of Newark*, 13 N. J. Misc. 397, 197 A. 667, Aff'd. 119 N. J. L. 134, 194 A. 865 (1937). There it had held that the 1932 legislation was a proper exercise of the paramount police power of the State in view of the public policy necessitating protection of associations from insolvency during the depression, and that, in the supervision and control of these institutions, the State could not be stayed by the claims of individual shareholders that their preexisting rights and relationships in these associations would be incidentally affected and modified. In the former of the latter two decisions, the Court pointed out the economic conditions which led to the enactment of Act 102, as follows:

> "It is a matter of common knowledge that a large percentage of all persons in this State over the age of twenty-one are members of building and loan associations and that assets and holdings of building and loan associations approximate, if they do not exceed, $1,000,000,000.
>
> "This Court must judicially notice the fact that investments of building and loan associations are regulated by statute and confined to classes of investment which are also by statute legal investments for banks, trust companies, insurance companies, and trustees,

particularly first mortgages on real estate located in New Jersey. The Court also judicially notices the fact that the associations have foreclosed thousands of these mortgages and bought in the property at the public sale, and that the value of these mortgages runs into hundreds of millions of dollars. The Court also judicially notices the enactment by the Congress of the United States of the Home Owners' Loan Act on June 13, 1933, c. 64, art. 1, Sec. 4, 48 Stat. 128, 129, as amended, title 12, Sec. 1463, U. S. C. A., and it is also common knowledge that thousands of mortgagors who were in default to the associations availed themselves of the benefit of this statute.

"When the Legislature in 1903 gave to withdrawing shareholders the unqualified privilege of suit, it did not foresee the economic collapse through which this country has labored for the last eight years, with the consequent credit stringency, loss of employment, and collapse of price levels. It is unnecessary to cite official statistics to establish what is common knowledge throughout the length and breadth of the land. *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330. In the face of this financial stringency the number of withdrawals filed by shareholders of associations accelerated at a very rapid rate. It cannot be assumed that they were an exception to what was generally happening in all saving institutions.

"The liabilities of building and loan associations to other than shareholders ordinarily amounts to but a negligible percentage of its assets. * * * Hence, under the economic conditions existing in 1932, by exercising the unfettered privilege of withdrawal and the concomitant right of suit, a rapidly increasing number of withdrawing shareholders created a condition of potential insolvency in all the building and loan associations of this State.

"If the right of withdrawal was not regulated and all notices of withdrawals were reduced to judgment, these judgment liabilities, coupled with the fact that by foreclosing mortgages the building and loan associations had acquired title to thousands of unsalable properties in this State, the inevitable result would have been that most of the building and loan associations would eventually become insolvent under section 65 of

the Corporation Act (as amended, N. J. St. Annual 1931, Sec. 47-65), if we are to consider insolvency to consist of their inability to pay the rapidly gathering withdrawal demands without thereby impairing the assets available to others with like rights.

"The Legislatures of 1903 and 1925 were neither omniscient or prescient, and events proved to the Legislature of 1932 that the unfettered privilege of suit granted to withdrawing members compelled these associations to accede to the prior demands of those who made an early request for withdrawals which would completely undo the major purposes for which they were created. The 1932 Legislature faced the unenviable choice of permitting conditions to continue as they were with the inevitable result being the actual insolvency of most, if not all, of the associations, or it could regulate the rights of a withdrawing shareholder in a manner consonant with mutuality. It chose the latter and enacted the statute in question, P. L. 1932, c. 102 (N. J. St. Annual 1932, Sec. 27—R (52).

"The actual insolvency of these mutual corporations would have been fraught with a grave public danger. Our insolvency statute, section 65 of the Corporation Act, is essentially bankrupt in character, *Bloch* v. *Bell Furniture Co.*, 111 N. J. Eq. 551, 561, 162 A. 414, 84 A. L. R. 885, and the object of the proceedings under the act is to distribute the estate of the debtor corporation, *Stockton* v. *Mechanics' & Laborers' Savings Bank*, 32 N. J. Eq. 163, 168, 169, and the matured creditors have right to payment at once, *Usher* v. *Sarco Co., etc.*, 100 N. J. Eq. 428, 431, 136 A. 199. Building and loan associations are subject to the provisions of the Corporation Act, Sec. 4 (2 Comp. St. 1910, p. 1600, Sec. 4), by the Building and Loan Act of 1903, as amended and revised, 1 Comp. St. Supp. 1924, Sec. 27—4, p. 223; Comp. St. Supp. 1930, Sec. 27—R (4), p. 135; P. L. 1932, p. 171 (N. J. St. Annual 1932, Sec. 27—R (4). If any great number of them became insolvent, ruinous liquidation necessarily would follow because withdrawing members would be entitled to be paid at once out of the assets of such insolvent associations.

"Mere contemplation of such a situation forces the conclusion that there was a tremendous and grave public interest involved. As long as the privilege of suit

was unabridged, potential insolvency was present as to many and actual insolvency of most necessarily would follow as a matter of course.

"The liquidation of the assets of these associations having a value of approximately $1,000,000,000 would have destroyed the stability of and the market for first mortgages on real estate and other types of investments that are prescribed as legal investments by statute for banks, trust companies, insurance companies, and other institutions and fiduciaries and to which classes of legal investments the funds of building and loan associations are restricted by law.

"The value of real property and real estate mortgages was largely gone for the time being, and liquidation could only be had on ruinous terms, but these values were susceptible of ultimate return. The result would be chaos and even under orderly liquidation of this vast amount of assets the ultimate return of these values would be indefinitely postponed if not irreparably impaired. The State has an important interest in the maintenance of real estate values because these values form the major base upon which its tax structure and its various political subdivisions rests. The stability of the tax base over a term of years is vitally important to the State.

"The structure of the tax base and the widespread membership in building and loan associations, and the fact that the value of the real estate mortgages and real property owned by such associations represents a high percentage of the total value of all taxable real estate in the State, creates a situation which is peculiar to this State."

The Court therefore held that the statute, in both its prospective and retroactive effect, was constitutional as a valid exercise of the police power in view of the public policy necessitating protection of building and loan associations during the depression, even though the statute was not strictly emergency legislation. The Court also pointed out that the constitutional provision against impairing obligations of contracts did not prevent such an exercise of power as was used in this case, citing *Home Building and Loan Association* v. *Blaisdell, supra.*

For two other reported decisions upholding the validity of the above changes made by Act 102, and their retroactive effect, see *Fornataro* v. *Atlantic Coast Building and Loan Association*, 10 N. J. Misc. 1248, 163 A. 240; and *Horowitz* v. *Guaranty Building & Loan Ass'n of the City of Newark*, 17 N. J. Misc. 274, 8 A. (2d) 768.

The courts of New Jersey are not alone in upholding such withdrawal arrangements. For example, in *State ex rel. Wagner, Sup'r* v. *Farm and Home Savings and Loan Association of Missouri*, 90 S. W. (2d) 93 (Supreme Court of Missouri, 1936), it was held that a plan for the reorganization of a building and loan association was reasonable and not violative of a shareholder's constitutional right of contract even though it prohibited withdrawals by shareholders for one year after reorganization and provided for graduated withdrawal fees thereafter prior to maturity. The Court said:

> "The appellant contends the right of withdrawal is a vested right under the contract between them and the association, and that any change in the right to withdrawal against the stockholder was an impairment of the right of contract in violation of Section 15, art. 2, of the Constitution of Missouri. • • • The appellants contend that under the by-laws of the defendant association and section 5604, R. S. 1929 (Mo. St. Ann. Sec. 5604, p. 797), by giving thirty days' notice and with a penalty of 2 per cent., they would be entitled to withdraw their shares of stock; while under the plan of reorganization they could not withdraw their stock during the first year, and if they did during the second year they would lose 6 per cent.; 4 per cent. during the third year, and 2 per cent. thereafter.
>
> "There was testimony to the effect that this prohibition upon withdrawals for one year after reorganization and provision for graduated withdrawal fees thereafter prior to maturity was reasonable and necessary in order that the association could function normally. This was so for the reason that such charges were found necessary to prevent the filing of withdrawal notices in amounts that would prevent the

flow of new money into the association, and when it failed to receive new money through an increased membership it would become self-liquidating and fail to render the service for which it was established."

Point IV.

Act 102 Changes Only the Remedy or Procedure for Enforcing Contracts, and Not Substantive Rights Under the Contract. Courts Uniformly Hold That Changes in Remedy Do Not Impair Obligation of Contract.

It should also be pointed out that Act 102 only changes the remedy or procedure whereby withdrawals are accomplished and affects in no way the substantive rights under the share contract. In *Rocker* v. *Cardinal Building and Loan Ass'n. of Newark, supra,* the Court pointed out this attribute of the New Jersey statute, saying:

> "The 1932 amendment of Section 52 does not reduce the amount of plaintiff's monetary interest in the defendant association. It is true that it provides a different scheme for the payment of withdrawals than that provided by the section which it amends, but the statutory changes merely related to the time, and not the quantum, of payment. This being so, the said amendment may be upheld as a procedural statute and binding upon all members of building and loan associations instituting suits for withdrawal after its enactment."

In *Home Building and Loan Association* v. *Blaisdell, supra,* this Court pointed out the distinction which could be drawn between statutes under the police power which affected the obligation and those which affected the remedy of contracts. Mr. Chief Justice Hughes, in writing the opinion of the Court in that case, pointed out to some extent the history of this distinction as follows:

> "Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges* v. *Crowninshield, supra,* p. 200. Said he: 'The distinction between the obligation of a contract, and the remedy given

by the Legislature to enforce that obligation, has been taken at the Bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in *Von Hoffman* v. *City of Quincy, supra*, pp. 553, 554, the general statement above quoted was limited by the further observation that 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' And Chief Justice White, quoting this language in *Antoni* v. *Greenhow*, 107 U. S. 769, 775, added: 'In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge.'"

After examining these old cases, it was then indicated that the obligation of a contract is not impaired by a law modifying the remedy or procedure for its enforcement as long as substantive rights secured by the contract were not impaired.

Also see the long list of cases cited in footnote 13, on page 434 of the above opinion, which cases have sustained as valid legislative changes in the remedy or procedure for enforcing contracts.

Since Act 102 only changes the remedy or procedure whereby withdrawals are accomplished and affects in no way the substantive rights under the share contract, it would follow from the above cases which uphold such changes that Act 102 is valid.

Point V.

Facts and Law Involved in Treigle v. Acme Homestead Ass'n Case Are Distinguishable From Those in Present Case.

The decision in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. R. L. 1284 (1935), upon casual study, might appear to be controlling in the instant case. Upon more thorough study, however, the distinguishing facts and circumstances become apparent.

The facts of the *Treigle* case are as follows:

Prior to the adoption of Act No. 140 of 1932 by the Legislature of Louisiana, building and loan associations in that State were required, whenever the income ordinarily applicable to the demands of withdrawing members was insufficient to pay all such demands within sixty days from date of notice, to set apart fifty per cent. of the receipts of the association to pay such withdrawing members, and payments were to be made in the order of presentation of notices of withdrawal. Act No. 140 abolished this requirement, and the amount to be allocated to payment of withdrawing members was by that Act left to the sole discretion of the directors, who were authorized to apply the association's receipts to the making of loans, to payment of old or new debts, to dividends to continuing members, or to the creation of a cash reserve for future dividends. A stockholder who, prior to the adoption of the Act, gave notice of withdrawal, but whose demand had not been paid, although similar applications had been paid, challenged the validity of the Act under the Federal Constitution.

The Court held: (1) that the Act impaired the obligation of the stockholder's contract and destroyed his vested rights in violation of Sec. 10 of Article I, and Sec. 1 of the Fourteenth Amendment, of the Federal Constitu-

tion; (2) that the Act was not justifiable control or regulation in the public interest of the operations of building and loan associations and was not a valid exercise of the police power; (3) as the Act did not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members were neither temporary nor conditional, it could not be treated as an emergency measure; (4) that the challenged sections of the Act were neither intended nor adapted to conserve the assets of building and loan associations, but affected merely the rights of members *inter sese*, and in this respect were unreasonable and arbitrary interference with vested contract rights; (5) that, though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to that end and must not be arbitrary or oppressive.

In the first place, a distinction can be made in the facts of the *Treigle* case from those in the present case. In the *Treigle* case, the application for withdrawal was filed before the Louisiana amendment was enacted into law; whereas in the present case the application for withdrawal was filed after the New Jersey amendment was passed.

A contrast of the basic changes made by the two amendments in the laws of their respective States is sufficient to indicate how widely the law involved in the two cases differs. Whereas the old Louisiana law required a definite amount to be set aside to pay withdrawing shareholders, the Louisiana amendment left the payment of withdrawals to the sole discretion of the directors of an association and they were even authorized, if they saw fit, to apply all the receipts to other purposes than payment of withdrawals.

On the other hand, whereas the old New Jersey law gave an undue preference to those shareholders who first filed

withdrawal requests and thus provided a withdrawal procedure which would have wrecked every building and loan association in that State and rendered practically valueless the share contracts of all shareholders, the New Jersey amendment provided a definite, orderly plan of withdrawal that was equally fair to all shareholders. Its object was to prevent "runs" on building and loan associations by withdrawing shareholders in view of the then precarious financial conditions of such associations. It was passed to prevent the utter collapse and insolvency of building and loan associations.

In other words, whereas the Louisiana amendment changed the law from a definite, equitable basis to an indefinite, arbitrary and inequitable basis, dependent upon the will of the directors; the New Jersey amendment changed the law from an inequitable basis, which allowed a few shareholders to secure a preference, and which would have rendered insolvent every association in that State, to an equitable basis which was in line with the remaining provisions of the statute, and which contemplated the "central idea of cooperation, equality and mutuality among the members."

Mr. Justice Roberts, speaking for the Court in the *Treigle* case, said:

> "Though the obligations of contracts must yield to a proper exercise of the police power, *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. [413] 415, 88 A. L. R. 1481, and vested rights cannot inhibit the proper exertion of [police] power, *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469; it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.
>
> "As we have pointed out, the questioned sections deal only with private rights and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of all the members.

> They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law."

The New Jersey Court of Errors and Appeals distinguished the New Jersey amendment from that of Louisiana, in *Bucsi* v. *Longworth Building and Loan Ass'n*, *supra*, by saying:

> "It may very well be that the statute in Louisiana was not passed 'for an end which is in fact public,' but the situation which faced our Legislature in 1932, if allowed to run unregulated to its apparent and ultimate economic conclusion, would have affected adversely every person in this State."

and then described the economic conditions in New Jersey as set forth above, at pp. 22 to 25.

The *Treigle* case can be reconciled with all of the other similar cases cited in this brief. The following reconciliation is set forth in the discussion relating to the right of a member in a building and loan association to withdraw in 12 C. J. S. Sec. 29, p. 437:

> "A member's right to withdraw is an absolute one which cannot be arbitrarily withheld, although it is subject to legislative changes made under a proper exercise of the State's police power [citing *State ex rel. Wagner v. Farm & Home Savings and Loan Ass'n. of Missouri*, 90 S. W. (2d) 93, 338 Mo. 313; *Bucsi* v. *Longworth Building and Loan Ass'n.*, 194 A. 857, 119 N. J. L. 120; *Rocker* v. *Cardinal Building and Loan Ass'n. of Newark*, 179 A. 667, 13 N. J. Misc. 397, affirmed 194 A. 865, 119 N. J. L. 134; *Formataro* v. *Atlantic Coast Building and Loan Ass'n.*, 163 A. 240, 10 N. J. Misc. 1248], particularly where such statutes relate merely to matters of procedure. [Citing *Rocker* v. *Cardinal Building and Loan Association of Newark*, 179 A. 667, 13 N. J. Misc. 397, affirmed 194 A. 865, 119 N. J. Law 134.] Legislation, however, which impairs the obligation of a withdrawing stockholder's contract and destroys his vested rights for no discernible public

purpose is unconstitutional. [Citing *Treigle* v. *Acme Homestead Association*, 56 S. Ct. 408, 297 U. S. 189, 80 L. Ed. 575, 101 A. L. R. 128-4, reversing 160 So. 637, 181 La. 941, 98 A. L. R. 69.]''

In view of the above distinctions that can be made both in the facts and the law in the *Treigle* case and this case, the decision in the former case is not viewed as a controlling precedent for the present case.

It is respectfully submitted, therefore, that the appeal of appellant be dismissed.

HORACE RUSSELL,
General Counsel.

DAVID A. BRIDEWELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 567.—October Term, 1939.

Harry M. Veix, Appellant,
vs.
Sixth Ward Building and Loan Association of Newark, New Jersey.

Appeal from the Supreme Court of the State of New Jersey.

[April 22, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

In 1928 and 1929 appellant purchased prepaid shares of the appellee, a New Jersey building and loan association, paying the par value of $200 per share. At that time the applicable New Jersey statutes provided that shares in such an association could be withdrawn by giving such written notice as the constitution or by-laws of the association provided, not to exceed 30 days; that withdrawals should be paid in the order in which notices were received, with not more than one-half of the receipts of any month being required to be used for payment of withdrawals, without the consent of the board of directors, until the oldest unpaid claim of withdrawal had been on file for six months; that no payment should be postponed for longer than six months from the date of notice; and that any member who had given notice could sue and recover the withdrawal value if it was not paid within six months of the notice.[1]

On April 22, 1932, these statutes were amended in four respects: (1) "total receipts" of an association, one-half of which were required to be used for the payment of withdrawals and which had not been previously defined, were defined as income on authorized investments, dues on shares of the association which were pledged with it to secure loans, and repayments from loans; (2) if in any one month the funds required to be payable for withdrawals were insufficient to pay all requested withdrawals, withdrawing members were to receive $500 each in the order of priority until the fund for withdrawals was exhausted; (3) no withdrawals were to be paid if

[1] Laws of N. J., 1925, c. 65, § 52.

the funds available for payment of matured shares were insufficient to pay all matured shares, the payment of which had been requested within thirty days after maturity; (4) so long as the funds of an association were applied as required by the amendment, no member who had filed his withdrawal notice should have a right to sue for the withdrawal value of his shares.[2]

In 1935 another amendment was passed providing that one-third of the "net receipts" of an association were to be payable for withdrawals, with "net receipts" defined as monies, other than borrowed monies, received by the association less operating expenses, payments on creditor obligations, payments for protecting the property of the association and reserves for any of these purposes. At the same time payments of withdrawals in the order in which notices had been received was continued but the payments were limited to $50 per member.

Minor amendments, not pertinent here, were added in 1936 and in 1937 the statutes, as they stood in 1936 with some immaterial changes, were carried into a general revision of New Jersey's statute law.

On August 17, 1932, after the passage of the 1932 amendment, appellant filed a written notice of withdrawal with respondent. In 1939, he brought this suit against respondent for the withdrawal value of his shares, claiming that, in so far as any of the amendments referred to altered the statutes in existence at the time of purchase of the shares, the amendments were unconstitutional violations of the contracts clause of Article I and the due process clause of the Fourteenth Amendment. The allegations show that the Association was solvent at the time of notice of withdrawal and has remained solvent. The trial court dismissed appellant's complaint. The Court of Errors and Appeals affirmed.

The ruling was based squarely on the constitutionality of the Act of 1932. The later acts were not referred to in the opinion except by pointing out that the Act of 1932 would be found in the 1937 revision. The case is here on appeal under Section 237(a) of the Judicial Code. As this section gives a review to this Court only of state statutes held valid by the highest court of a state against an attack for repugnancy to the Constitution of the United States,

[2] Laws of N. J., 1932, c. 102.

we deem ourselves limited to the Act of 1932.[3] The question of the applicability to withdrawals of statutes on the subject which were passed subsequent to the notice of withdrawal is not considered in this opinion.[4]

The New Jersey statutes concerning the regulation of building and loan associations reach back many years prior to the purchase of these shares. Beginning in 1903 general regulatory acts were passed at intervals with sections directed at the mode of withdrawal.[5] The form of these statutes and the judicial notice by the Court of Errors and Appeals in the *Bucsi* case of the importance to the State of New Jersey of building and loan associations makes clear that in dealing in 1932 with the problem of withdrawals the legislature was faced with the threat of wrecked associations and the consequent further depression of real estate values throughout its area. While the act of 1932 now under review was not emergency legislation, the dangers of unrestricted withdrawals then became apparent. It was passed in the public interest to protect the activities of the associations for the economic welfare of the State. It is also plain that the 1932 act was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations. We are dealing here with financial institutions of major importance to the credit system of the State.[6]

With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares.[7] Unquestionably for the future, the provisions of the 1932 act would be effective.[8] We think they were equally effective as to shares bought prior to the enactment of the statute, notwithstanding the provisions of Article

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[3] Cf. Bucsi *v.* Longworth B. & L. Assn., 119 N. J. L. 120, where the same court dealt with statutes enacted after notice of withdrawal.

[4] Cf. Carpenter *v.* Wabash Ry. Co., No. 230 this Term, decided January 29, 1940.

[5] Bucsi *v.* Longworth B. & L. Assn., 119 N. J. L. 120, 124; Laws of N. J., 1903, c. 218, § 38; Laws of N. J., 1925, c. 65, § 49; Laws of N. J., 1932, c. 102; Revised Statutes of N. J., 1937, 17:12-49, 12-53.

[6] Hopkins Savings Assn. *v.* Cleary, 296 U. S. 315, 328; cf. Piquet, Building & Loan Associations in New Jersey, cc. II, VI and X.

[7] Dillingham *v.* McLaughlin, 264 U. S. 370; Noble State Bank *v.* Haskell, 219 U. S. 104; Doty *v.* Love, 295 U. S. 64.

[8] Stockholders *v.* Sterling, 300 U. S. 175, and cases cited.

I, Section 10 of the Constitution that "No State shall . . . pass any . . . . Law impairing the obligation of contracts. . . ." This is so because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power. Beginning with the 1903 act the State of New Jersey has laid down specifically by statute the requirements for withdrawal. The charter, by-laws and membership certificate ceased to determine withdrawal rights. (See Note 5, *supra.*) It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.[9]

In *Home Building & Loan Association* v. *Blaisdell*[10] this Court considered the authority retained by the state over contracts "to safeguard the vital interests of its people." The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety.[11] It extends to economic needs as well.[12] Utility rate contracts give way to this power,[13] as do contractual arrangements between landlords and tenants.[14]

The cases cited in the preceding paragraph make repeated reference to the emergency existing at the time of the enactment of the questioned statutes. Many of the enactments were temporary in character. We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not. "Emergency does not create [constitutional] power, emergency may furnish the occasion for the exercise of

[9] Rast v. VanDeman & Lewis, 240 U. S. 342, 363; Semler v. Dental Examiners, 294 U. S. 608, 610.

[10] 290 U. S. 398, 434 *et seq.*

[11] Stone v. Mississippi, 101 U. S. 814, 819; Douglas v. Kentucky, 168 U. S. 488, 497-99; Beer Co. v. Massachusetts, 97 U. S. 25, 32, 33; Mugler v. Kansas, 123 U. S. 623, 664, 665; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 750; Chicago, etc. R. R. v. Nebraska, 170 U. S. 57, 70, 74; Texas & N. O. R. R. v. Miller, 221 U. S. 408, 414; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558; Manigault v. Springs, 199 U. S. 473.

[12] Sproles v. Binford, 286 U. S. 374, 390; Stephenson v. Binford, 287 U. S. 251, 276; Henderson Co. v. Thompson, 300 U. S. 258, 266; Patterson v. Stanolind Co., 305 U. S. 376.

[13] Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372; Midland Co. v. K. C. Power Co., 300 U. S. 109.

[14] Marcus Brown Co. v. Feldman, 256 U. S. 170; Levy Leasing Co. v. Siegel, 258 U. S. 242.

power.'"[15] We think of emergencies as suddenly arising and quickly passing. The emergency of the depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. When the 1932 act was passed commercial and savings banks, insurance companies and building and loan associations were suffering heavy withdrawals. The liquid portion of their assets were being rapidly drained off by their customers, leaving the long term investments and depreciated assets as an inadequate source for payment of the remaining liabilities. An acceleration or a continuanee of this tendency to withdraw available funds threatened a quick end to the ability of the institutions to meet even normal demands. Such threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary.[16]

This power of the state to protect its citizens by statutory enactments affecting contract rights, without a violation of the contract clause of the Constitution is analagous to the power often reserved to amend charters. Under this reserved power, it is held that the relations between a stockholder or certificate holder and the corporation may be varied without impairing the contract existing between the corporation and its stockholder or member[17] The contract rights considered in *Coombes* v. *Getz*[18] arose from a contract between a third party and the corporation. And the power reserved against the corporation and its members was deemed to be ineffective against a stranger to the reservation.

Appellant relies upon *Treigle* v. *Acme Homestead Association*[19] as a determinative precedent in support of his argument that the withdrawal arrangements between the association and appellant were contractual and secure from impairment by the statutory exercise of the paramount police power of the State. In that case

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15 Home Bldg. & L. Assn. *v.* Blaisdell, *supra*, 426.

16 Cf. W. B. Worthen Co. *v.* Thomas, 292 U. S. 426, 432.

17 Wright *v.* Minnesota Mutual Life Ins. Co., 193 U. S. 657, 663; Polk *v.* Mutual Reserve Fund, 207 U. S. 310, 325; Stockholders *v.* Sterling, 300 U. S. 175, 183.

18 285 U. S. 434.

19 297 U. S. 189.

statutory changes as to the right of withdrawal, similar to these involved here, had been made after the purchase of the shares. The enactment in the *Treigle* case occurred after notice of withdrawal. From all the circumstances of the Louisiana building and loan situation at the time of the legislation attacked in the *Treigle* case this Court reached the factual conclusion that the withdrawal amendment to the building and loan statutes was directed merely toward a private right and not deemed in the public interest.

It is to be noted that this Court was careful to point out in the *Treigle* case[20] that where the police power is exercised "for an end which is in fact public" contracts must yield to the accomplishment of that end.[21]

Certainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power.

Separate consideration of the objection to the legislation under the due process and equal protection clauses of the Fourteenth Amendment seems wholly unnecessary.

Affirmed.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[20] *Id.*, 197.

[21] Cf. Indiana *ex rel.* Anderson v. Brand, 303 U. S. 95, 108.